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CONTENTS.

EDITORIALS.

Constitutional Punishment for Violators of the Liquor Law, ... 141

Power of Terminal Association to Make Rules for the Government of Shippers, . . . 141

NOTES OF RECENT DECISIONS.

Criminal Law—Bigamy—Proof of First Marriage, 141

Wills—Legality of Spendthrift Will, . . . 142

Liability of Tenant for Failing to Keep Premises in Repair, ... 143

Foreign Judgment—Revivor—Statute of Limitations, ... 144

Electric Wires—Defective Insulation—Negligence, 144

Street Railroad—Collisions—Negligence—Electric Railway, ... 145

Evidence—Admissibility of Telephone Communications, ... 145

LEADING ARTICLE.

How Far a Railway Company is Charged with Notice of the Incompetency of Its Employees in an Action by a Co-employee against the Company for Damages for Injury. By Percy Edwards, ... 146

LEADING CASE.

Verdict—Review on Appeal—Accident Policy—"Visible Mark of Injury"—"Total Disability"—Notice and Proof of Loss. Pennington v. Pacific Mut. Life Ins. Co., Supreme Court of Iowa, May 23, 1892 (with note), ... 148

CORRESPONDENCE.

Punishment for Sale of Intoxicating Liquors, . 152

BOOKS RECEIVED, ... 153

HUMORS OF THE LAW, ... 153

WEEKLY DIGEST OF CURRENT OPINIONS, . . . 153

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A correspondent, whose letter appears in another column, takes vigorous exception to our view of the case of O'Neil v. State of Vermont, upon which we commented in a recent issue. We there took the position that the technical refusal of the supreme court to assume jurisdiction was a wrong and a hardship upon the defendant, whose punishment for a single violation of the liquor law of Vermont, was not only out of proportion to the offense committed, but, as was conceded by the court, was in violation of the constitutional inhibition against "cruel and unusual" punishment. And we see no substantial reason offered by our esteemed correspondent which should alter our opinion. All law abiding citizens will admit, with him, the force of his argument against the illegal sale of intoxicating liquors, and will not deny that violators of the law should be punished. But beyond and above this is the constitutional mandate which says that even a convicted violator of the law shall not be subjected to a punishment which is cruel and unusual. The logic of our friend carries him too far. Upon his theory a sentence of hanging imposed upon one who, in violation of law, had made a sale of liquor, would be justifiable. We submit that, in a court of law, a criminal has the right to demand, not only a constitutional trial, but also a constitutional punishment when found guilty. And the evil consequences resulting from the sale of intoxicating liquor, which our friend so warmly pictures, is no more far reaching than the failure of justice, through technicality and disregard of constitutional rights.

The decision of the Supreme Court of Georgia, in Miller v. Georgia Railroad & Banking Co., is a contribution to the modern discussion of the power of railroad companies, common carriers and terminal associations to make rules and regulations for the guidance and government of shippers. We called attention, some time ago, to this question, and in connection therewith mentioned the decision of Judge Toney, of the Louisville equity court, in Kentucky Wagon Mfg. Co. v. L. & N. R. R. Co., 34 Cent. L. J. 69. The Supreme Court of Georgia, in the case first noted, cite with approval the opinion of Judge Toney. The exact point decided by the Georgia court is that it is competent for a common carrier whose customers, at their option, have the privilege of unloading for themselves the vehicles in which their freights are shipped, to adopt and enforce a reasonable regulation as to the time within which the vehicles may be unloaded free of any expense for storage, and to fix a reasonable rate per day at which storage will thereafter be charged for the use of such vehicles so long as they remain unloaded, and that a rate of one dollar per day for each railroad car thus devoted to the use of storing freight is not necessarily unreasonable because cars are of different sizes and vary in capacity, nor because a fraction of a day is charged for as a whole day, nor because the customary rate of storage in warehouses or elevators is much lower; nor is it, as a matter of law, unreasonable for any cause.

NOTES OF RECENT DECISIONS.

CRIMINAL LAW—BIGAMY—PROOF OF FIRST MARRIAGE.—One of the points decided by the Supreme Court of Georgia in Dale v. State, 15 S. E. Rep. 287, is that in a trial for bigamy the first marriage may be established by proof of a marriage in fact celebrated in another State of the Union, followed by cohabitation in that State, and the birth of children. These facts will authorize the jury to infer the validity of the marriage, even though the marriage laws of that State be not affirmatively proved, there being nothing in the evidence tending to show that the marriage was not regular and conformable to law. Simmons, J., says:

One of the grounds mainly relied upon was the fourth, which complains that the evidence was insufficient to show a marriage valid under the laws of North Carolina. It is also complained of as error that the court instructed the jury that, if they were satisfied from the evidence that a marriage in fact was contracted between the defendant Emma T. Horton at the time named in the indictment, and he afterwards lived with her, and acknowledged her to be his wife, this would be sufficient to authorize them in finding that he was legally married to her. It was contended that, as marriage was regulated in North

Carolina by statute, it must be shown that the statute was complied with. There was evidence of a marriage ceremony in North Carolina, in the year 1867, between the defendant and Emma T. Horton; her brother, George P. Horton, testifying that the defendant was Nuthall, and that he saw him married to Emma by a minister, at Wadesboro in that State, at her father's house in the presence of the family and friends. There was also evidence that the marriage was followed by cohabitation of the parties, in the same State, for a number of years, resulting in the birth of several children. The witness Horton testified that the records of the marriage were destroyed. He also testified that marriage was regulated in North Carolina by statute; but there was no evidence as to what the statutory requirements were, or that there was any failure to comply with them. This evidence was sufficient to establish the marriage as *prima facie* valid. Where a marriage in this State is in question upon a trial for bigamy, proof by a witness who was present, of a marriage in fact, is sufficient, without evidence as to the authority of the person officiating, or of compliance with statutory requirements. Murphy v. State, 50 Ga. 150. By the common law and the law of this State, a mutual agreement to be husband and wife, by parties able to contract, followed by cohabitation, is recognized as a valid marriage. Askew v. Dupree, 30 Ga. 173; Clark v. Cassidy, 64 Ga. 662. The proof in this case showing a marriage valid under the common law or the law of this State, and there being no evidence as to the statutory requirements of North Carolina, or of any failure to comply with them, the jury were authorized to infer that the marriage was valid under the laws of that State. There is some conflict in the decisions of other courts on this subject, some holding that the prosecution must prove not only a marriage in fact, but a marriage valid under the law of the State in which it took place; but we think the better view is that the validity of the marriage will be presumed, in the absence of evidence tending to show that it was not regular and conformable to law. Mr. Bishop, in his New Commentaries on Marriage, Divorce & Separation (1891, volume 1, § 1115), says: "Whenever, in a proven transaction in any foreign country, two apparently marriageable persons are shown to have entered into any form of solemnization or contract which comprehends a present undertaking to be husband and wife, and nothing appears to cast discredit on the proceeding, the foreign law should be presumed *prima facie* to make them married." In Wharton on Criminal Evidence (section 169) it is said: "In any view, the *judex fori* will presume, until the contrary be proved, that a marriage abroad was in conformity with the *lex loci contractus*." The American and English Encyclopedia of Law (volume 2, p. 192, tit. "Bigamy") says: "A marriage sufficient in form to be valid under the laws of the State where the offense is prosecuted, though celebrated in another State, will be presumed to be sufficient under the laws of that State, when there is no evidence to the contrary." Among the cases which sustain this view, see the following: State v. Nadal, 69 Iowa, 478, 29 N. W. Rep. 451; Dumas v. State, 14 Tex. App. 464; State v. Patterson, 2 Ired. 346; Hutchins v. Kimmell, 31 Mich. 126. The last of these cases it will be seen, is of later date than that of People v. Lambert, by the same court—5 Mich. 349 (1858)—which seems to be the case mainly relied on by counsel for the plaintiff in error.

WILLS—LEGALITY OF A SPENDTHRIFT WILL.—The Supreme Court of Maine, in the case of Roberts v. Stevens, passed upon the legality of a spendthrift will. Upon that question the court say:

Are they unlawful? There is neither any decision of this court nor statutory provision in this State pertaining to the subject. There is a conflict among the authorities in this country, though in England they all seem to be opposed to any such restrictions as the testator made. The latter authorities hold in substance that the interest of a life tenant cannot continue to exist without its incidents, among which is that of alienation; and that a creditor of a *cestui que trust* can reach in equity whatever the latter has the right to demand from his trustee. In Brandon v. Robinson, 18 Ves. 429, money was vested in the names of trustees, the income to be paid into A's own hands to the extent that the same should "not be grantable, transferable or otherwise assignable by way of anticipation," with a gift over on A's death. On A's becoming bankrupt, the assignees were held entitled to his interest. This decision was preceded and followed by numerous others to the same purport. But while the decisions in several of the State courts are in accord with the English rules, others together with two of the Federal Supreme Court uphold such trusts. And the legislatures of four or five States sanction their validity by express statutes, though Kentucky by legislative enactment forbids them. Parsons v. Spencer, 83 Ky., 386. But whatever may be the decisions in England and some of the State courts, the other view held by the United States Supreme Court and other State courts is more in accordance with our own, which we think may be properly based upon either of two grounds. The general rule that rights incidental to ownership of property attach alike to equitable and legal estates has been materially modified by equity. In direct antagonism to, and for the avowed purpose of evading what were deemed certain harsh and unjust dogmas of the law, equity called into existence an estate which enabled a married woman to hold equitable interests in property independently of her husband's control. But as this estate brought with it the enjoyment of all its incidents including the right of alienation, an unsatisfactory and imperfect protection was thereby afforded her because of the influence and moral coercion of her husband. It was therefore deemed essential to go further and modify this estate by inserting in settlements and wills a clause restraining the wife from anticipating or alienating her separate property. This was first done in a certain settlement by advice of Lord Thurlow, who was a trustee. Pybus v. Smith, 3 Bro., C. C., § 340 (Perkins' ed.), and note. And the reason why she can be thus restrained, as stated by Cotton, L. J., is "because equity can modify the incidents of separate estate which is the creation of equity." Pike v. Fitzgibbon, L. R., 17 Ch. D. 454. This doctrine has been repeatedly stated in numerous cases. In Tullett v. Armstrong, 4 Myl. & Cr. 377, Lord Cottonham, C., said: "The power to prohibit anticipation could only have been founded upon the power of this court to model and qualify an interest in property which itself had created." "The separate property and the prohibition of anticipation are equally creatures of equity and equally inconsistent with the ordinary rules of property. The one is only a restriction and qualification of the other." "When this court first established the separate estate, it violated the laws of property as between husband and wife; but it was thought beneficial and it prevailed. It being once settled that a wife might enjoy separate estate as a *feme sole*, the laws of property attached to

the new estate; and it was found, as part of such law, that the power of alienation belonged to the wife and was destructive of the security intended for it. Equity again interfered, and by another violation of the laws of property, supported the validity of the prohibition against alienation." Thus the doctrine was placed upon the long and well-recognized broad ground that a court of chancery had the inherent power to modify its own creation. In the absence of any statute of decision in this State to the contrary, we have no hesitation in extending the principle to cases like the present. This view is sustained by a very able opinion of the supreme court in Missouri; and in closing this branch of the case we can do no better than adopt the language of Sherwood, J., in that case: "If the court of equity, in order to protect one class of trusts, creatures of its own creation, and by so doing to effectuate the intention of the author of the gift, exercises its own inherent power to model and qualify an interest in equitable property without regard to the rules which the law has established for regulating the enjoyment of property in other cases, it is difficult to see why, with a like object in view, *i. e.*, the effectuation of the gift just as its author intended it to be effectuated, such court may not lay down and declare a rule, in such a case as this, which shall be equally effectual in preventing the intention of the donor from being thwarted, a rule which injures or defrauds no one, which violates no rule of public policy, and which gives stability and protection to a provision, which, originating in the warmest ties of affection, seeks to afford to the beneficiary a sure and unfailing refuge against the vicissitudes of fortune. If a court of equity, as already seen, will guard such a trust in one case with jealous solicitude, why should it fail to do so in another, in circumstances equally meritorious?" Lambert v. Haydel, 96 Mo. 439. Another view, arriving at the same result, is taken by the highest court in the country as well as the supreme courts of several of the States in the Union. Thus Miller, J., said: "We see no reason in the recognized nature and tenure of property and its transfer by will, why a testator who gives without any pecuniary return, who gets nothing of property value from the donee, may not attach to that gift the incident of continued use, of uninterrupted benefit of the gift during the life of the donee. Why a parent, or one who loves another, and wishes to use his own property in securing the object of his affection, as far as property can do it, from the ills of life and the vicissitudes of fortune, and even his own improvidence or incapacity for self-protection, should not be permitted to do so." Nichols v. Eaton, 91 U. S. 716, 727. See also Hyde v. Woods, 94 U. S. 533. "Spendthrift trusts" were created in Pennsylvania in Chief Justice Gibson's time and have been approved by numerous decisions in that State, among the latest of which is Grothe's Appeal, *supra*. The court in Massachusetts has frequently held that the founder of a trust may give an equitable life tenant a qualified estate in income which he cannot alienate and his creditors cannot reach. In Broadway v. National Bank v. Adams, 133 Mass. 170, 173, the court said: "By the creation of a trust like this, the property passes to the trustee with all its incidents and attributes unimpaired. He takes the whole legal title to the property, with the power of alienation; the *cestui que trust* takes the whole legal title to the accrued income at the moment it is paid to him." "We are not able to see that it would violate any principles of sound public policy to permit a testator to give to the object of his bounty such a qualified interest in the income of a trust fund, and thus provide against the improvidence or misfortune of the beneficiary." See also Baker v. Brown, 146 Mass. 369; Sears v. Choate, *Id.* 395, 398; Maynard v. Cleaves, 149 *Id.* 307, 308; Slatterly v. Wason, 151 *Id.* 266. To the same purport see Smith v. Towers, 69 Md. 77; Barnes v. Dow, 59 Vt. 530, 543.

LIABILITY OF TENANT FOR FAILING TO KEEP PREMISES IN REPAIR.—In Fellows v. Gilhuber, decided by the Supreme Court of Wisconsin, it was held that the owner of a building leased to a tenant, where the tenant had covenanted in the lease to keep the premises in good repair, could not be held liable for an injury caused by neglect of the tenant in making repairs. The court says:

There is nothing in the case but what admits squarely and fairly the application of the principle that the lessee, under such a lease, is liable for any injury occasioned by the want of repair of any part of the leasehold premises, and not the landlord. The lease requires the lessor to repair certain parts of the premises, and, by construction, excluding this awning, which affirmatively imposes upon the lessee the duty to repair it, besides the stipulation that he "shall keep the buildings in order at his own expense." This question was raised by the requests of the defendant to submit it specially to the jury, whether Davlin agreed to keep the buildings in repair or in order, etc. As we view the question, this fact is fatal to the recovery against the defendant. This has long been the doctrine of the common law, and in England has never been changed: Payne v. Rogers, 2 H. Bl. 350; Russell v. Men of Devon, 2 Term R. 667; Cheetham v. Hampson, 4 Term R. 318; Pretty v. Bickmore, L. R. 8 C. P. 401; Gwinnell v. Eamer, L. R. 10 C. P. 658; Robbins v. Jones, 15 C. B. (N. S.) 221; Nelson v. Brewery Co., 2 C. P. Div. 311. Most of the American follow the English authorities: Mellen v. Morrill, 126 Mass. 545; Leonard v. Storer, 115 Mass. 86; Bartlett v. Boston, G. L. Co., 117 Mass. 533; City of Lowell v. Spaulding, 4 Cush. 277. In Harris v. Cohen, 50 Mich. 324, 15 N. W. Rep. 493, the tenant is made liable even for a nuisance: Burdick v. Cheadle, 26 Ohio St. 393; Fisher v. Thirkell, 21 Mich. 1; Coke v. Gutkese, 80 Ky. 598; 2 Shear. & R. Neg. p. 587, Sec. 503; Thomp. Neg. 309, note. "A landlord who lets a house in a dangerous state is not liable to the tenant's customers or guests for accidents." Shear. & R. Neg. 711. "The landlord is not liable for injuries occasioned by a dangerous condition of the premises existing at the time of the lease, if there was no covenant to repair in the lease, but the tenant is." Ray Neg. Imp. Dut. 61 and cases cited. In New York at first it was so held: Jaffe v. Harteau, 56 N. Y. 398. But subsequently, by a divided court, the doctrine is questioned and left unsettled in Edwards v. Railway Co., 98 N. Y. 245. But it would seem that the current of authorities in this country, as well as in England, is in favor of the principle, and on sound reasoning; and it being a new question in this court, we are at liberty to adopt it. By many of these cases it is held to make no difference whether the defective structure is a nuisance or not or whether it is an obstruction to a highway. The principle is evidently strengthened by the injured party being a guest of the lessee at the time of the accident. The court should have submitted to the jury the questions of the lease and its terms, as requested, with the view of enforcing this principle, by ordering

nonsuit in the case. This relation of the defendant as landlord of the dangerous structure, by the terms of the lease, clearly precludes a recovery against her for the injuries of the plaintiff.

FOREIGN JUDGMENT — REVIVOR — STATUTE OF LIMITATIONS.—One of the points decided by the Supreme Court of Kansas, in Rice v. Moore, is that the revivor of a judgment in Ohio is merely a continuation of the original suit, so as to restore the judgment, and such revivor, made without an appearance by or personal service upon the defendant, who has been a resident of Kansas for more than five years after the rendition of the original judgment, will not remove the bar of the statute of limitations of this State. The court say:

The question is whether the petition is sufficient, in view of the five years' statute of limitations prescribed by our statute (sec. 18, Civil Code; Burns v. Simpson, 9 Kan. 658; Mawhinney v. Done, 40 Kan., 676, 17 Pac. Rep. 44). Where it is apparent from the face of the petition that the debt or claim is barred, a demurrer is properly sustained (Zane v. Zane, 5 Kan. 134; Stanclift v. Norton, 11 Kan. 218). If there had been no revivor of the judgment in Ohio, we suppose it would be conceded, even if the judgment had not become dormant under the statutes of that State, no recovery could be had upon the judgment in this State, if Mr. Moore had been an actual resident of this State for five years—the full time of our limitation — after the rendition of the judgment, authorities are to the effect that "remedies are to be governed by the laws of the country where the suit is brought." The laws of this State where the action is brought must govern the limitation. It was recently decided by this court in Bauserman v. Charlott (46 Kan. 480, 26 Pac. Rep. 1051) that, "where an action is brought in this State upon a judgment of a court of record of a sister State, which is in full force in that State, the statute of limitations of this State, and not that of the sister State, will control" (U. S. v. Donnally, 8 Pet. 372). It is contended, however, as the judgment was revived in Ohio in January, 1889—a few months only before this action was commenced—that the bar of the statute of limitations is not effective. A *scire facias* to revive a judgment is not a new suit, but the continuation of an old one (Freem. Judgm. sec. 444; Elsasser v. Haines, 52 N. J. Law, 10, 18 Atl. Rep. 1095). In Irwin v. Nixon, 11 Pa. St. 425, it is said to be "a common, plain and familiar principle that a *scire facias* to revive a judgment · · · is but a continuation of the original action, and the execution thereon is an execution on the former judgment. The judgment on the *scire facias* is not · · · a new judgment, giving vitality only from that time, but it is the revival of the original judgment, giving, or rather continuing, the vitality of the original judgment, with all its incidents, from the time of its rendition" (Lessee of Penn. v. Klyne, 1 Pet. C. C. 448; 2 T. & H. 379). Hence the proceeding in Ohio in January, 1889, must be regarded as a continuation only of the former suit or judgment. This seems to be admitted in the brief of counsel for plaintiff, for it is stated that "reviving a judgment is the act by which a judgment has lain dormant or without any action upon it for a year and a day is, at common law, again restored to its original force." The revivor of the Ohio judgment removes its dormant quality only, but does not affect the statute of limitations in this State, or in any way prevent its running against the judgment rendered in 1879. We think, within the provisions of our Civil Code concerning limitations, the action upon the judgment ought to have been brought within five years after its rendition, if, during all of that time, Moore was personally present within this State. If brought after five years, it is too late. If, however, it be claimed that the revivor in Ohio is not a mere order that execution issue, but a new judgment, and therefore of full force as a new judgment of the date of January, 1889, no action can be brought thereon in this State, because Moore was not personally served in the proceeding for revivor, nor enter any appearance therein. Kay v. Walter, 28 Kan. 112. In the last case this court decided that a judgment rendered in Pennsylvania on May 26, 1864, and revived in 1867, and again in 1877, but sued on in this State in 1881, "was unquestionably barred by the five years' statute of limitations." In the case of Hepler v. Davis (Neb., 49 N. W. Rep. 458) a judgment was recovered against A, in Illinois, in 1879. A removed to Nebraska soon afterwards and continued to reside in that State. In 1888 the judgment was revived in Illinois, without personal service upon A, or an appearance by him. In December, 1888, nine years after the judgment was rendered, an action was brought upon it in Nebraska. In that State, as in ours, the limitation of five years as to judgments exists. It was held in that case, Maxwell, J., delivering the opinion, that an action upon a judgment of a sister State must be brought in Nebraska within five years, or it will be barred, and that the alleged revivor of the judgment in Illinois in 1888 did not remove the bar of the statute of Nebraska. That case is very similar to this one. See, also, Eaton v. Hasty, 6 Neb. 419; Tessier v. Englehart, 18 Neb. 167, 24 N. W. Rep. 734; Marx v. Kilpatrick, 25 Neb. 107, 41 N. W. Rep. 111. Moore having resided in this State for five years after the original judgment against him was rendered and before the alleged revivor, or the commencement of this action, our statute of limitations prevents any action upon the judgment from being maintained.

ELECTRIC WIRES — DEFECTIVE INSULATION —NEGLIGENCE.—The Supreme Court of Louisiana, in the recent case of Clements v. Louisiana Electric Light Co., made an application of the doctrine of contributory negligence to the subject of electric wires. The injury complained of was occasioned by running against electric wires properly insulated, and the court held the company liable. The syllabus of the case, made by the court, is as follows:

1. The violation of a duty specified by law is negligence; therefore, when a city ordinance under which an electric lighting company is operated requires it to have the "splices" on its wires perfectly insulated, the failure to do so is negligence.

2. A person whose occupation brings him in proximity to the company's wires has a right to believe that the wires have been insulated and the ordinance complied with. He is required to look for patent defects in the insulation only. If not aware of a latent

defect, he comes in contact with the wire and is injured without fault on his part, the company is responsible.

3. When the action of both parties must have concurred to produce the injury, it dovolves upon the plaintiff to show that he was not himself guilty of negligence.

4. This proof need not be direct, but may be inferred from the circumstances of the case.

5. Where an electric wire is stretched over a roof, and a party goes on the roof to repair it, and the wire is of that height above the roof that the chances are that he will come in contact with it by going under it or stepping over it, it is not negligence to pursue either mode of crossing, if he exercises all necessary and prudent care to protect himself in proportion to the danger.

6. When a person is employed in the presence of a known danger, to constitute contributory negligence, it must be shown that plaintiff voluntarily and unnecessarily exposed himself to the danger.

STREET RAILROAD — COLLISIONS — NEGLIGENCE—ELECTRIC RAILWAY.—That the introduction of rapid street railway transit, either by cable or electricity, renders necessary, on the part of travelers, at crossings, a greater degree of care to avoid injury, is illustrated by the case of Carson v. Federal St., etc. Ry. Co., recently decided by the Supreme Court of Pennsylvania. It was there held gross negligence to drive in front of a moving electric street car so near as to make a collision inevitable, and that such conduct defeats an action to recover damages. In that case the servant of the plaintiff, while passing along a street at right angles with the tracks, drove in front of a moving electric street car, without looking for the approach of the car. The driver testified, however, that he listened for the sound of a gong, but the court decided that he was guilty of contributory negligence and could not recover. The introduction of electricity as a motive power on street railways has already occasioned considerable litigation. In commenting upon the increased care made necessary by the use of electricity the court says:

The street railway has become a business necessity in all great cities. Greater and better facilities and a higher rate of speed are being constantly demanded. The movement of cars by cable or electricity along crowded streets is attended with danger, and renders a higher measure of care necessary, both on the part of the street railways, and those using the streets in the ordinary manner. It is the duty of the railway companies to be watchful and attentive, and to use all reasonable precautions to give notice of their approach to crossings and places of danger. Their failure to exercise the care which the rate of speed and the condition of the street demand, is negligence. On the other hand, new appliances rendered necessary by the advance of business and population in a given city impose new duties on the public. The street railway has a right to the use of its track, subject the right of crossing by the public at street intersections; and one approaching such a place of crossing must take notice of it, and exercise a reasonable measure of care to avoid contact with a moving car. It may not be necessary to stop on approaching such a crossing, for the rate of speed of the most rapid of these surface cars is ordinarily from six to nine miles per hour; but it is necessary to look before driving upon the track. If, by looking, the plaintiff could have seen and so avoided an approaching train, and this appears from his own evidence, he may be properly nonsuited. Marland v. R. R. 123 Pa. 487.

EVIDENCE — ADMISSIBILITY OF TELEPHONE COMMUNICATIONS — AGENCY OF OPERATOR.—In Oskamp v. Gadsden, decided by the Supreme Court of Nebraska, defendant called at the public telephone station at Schuyler, and asked the operator to request plaintiffs to step to the telephone in their place of business in Omaha, as he desired to converse with them. H, one of the plaintiffs, answered the call, but, owing to the conditions of the atmosphere, the parties were unable to communicate directly with each other. The telephone operator at Fremont, an intermediate station, proposed to and did transmit defendant's message to plaintiffs, offering to sell them a quantity of hay, and he also repeated to the defendant their answer, accepting the proposition. In an action for a breach of the contract, it was held that the conversation was admissible in evidence, and that it was competent for the defendant to state the contents of plaintiffs' answer to his message, as repeated by the operator at Fremont at the time it came over the wire. The court said, *inter alia:*

Error is assigned because the court admitted the testimony of the defendant as to the conversation over the telephone between the witness and Mr. Haines, one of the plaintiffs, as repeated over the wire by Mrs. Cummings, the telephone operator at Fremont. It is contended that the testimony of the witness of what the operator repeated to him as the conversation progressed as being said by Mr. Haines is irrelevant and hearsay. The question thus presented is a new one to this court, and they are but few decided cases which aid us in our investigation. But upon principle it seems to us that the testimony is competent, and its admission violated no rule of evidence. It was admissible on the ground of agency. The operator at Fremont was the agent of defendant in communicating defendant's message to Haines, and she was also the latter's agent in transmitting or reporting his answer thereto to defendant. The books on evidence, as well as the adjudicated cases, lay down the rule that the statements of an agent within the line of his authority are admissible in evidence against his principal. Likewise, it has been held that, where a conversation is carried on between persons of different nationalities

through an interpreter, the statement made by the latter at the time the conversation occurred as to what was then said by the parties is competent evidence, and may be proven by calling persons who were present and heard it. This is too well settled to require the citation of authorities. There are certainly stronger reasons for holding the statement made by the operator and testified to by defendant is admissible than in the case of an interpretor. Both Haines and defendant heard and understood the operator at Fremont, and knew what she was saying, or at least could have done so. Each knew whether his message was being correctly repeated to the other by the operator. Not so where persons converse through an interpreter. If the testimony objected to was incompetent, and hearsay, then the testimony of Haines, relating to the same conversation, should, for the same reason, have been excluded. He did not hear what defendant said, but testified to what the operator reported as having been said. The operator at Fremont was not the agent of the defendant alone, but she was plaintiff's agent in repeating their answer to defendant's message. That conversations held through the medium of telephone are admissible as evidence in proper cases cannot be doubted. Such have been the holdings of the courts in cases where the question has been before them. In a criminal case People v. Ward, 3 N. Y. Crim. R. 483, it was held that, where a witness testifies that he conversed with a particular person over the telephone, and recognized his voice, it was competent for him to state the communication which he made. In Wolf v. Railway Co., 97 Mo., 473, 11 S. W. Rep. 49, it was ruled that if the voice is not identified or recognized, but the conversation is held through a telephone kept in a business house or office, it is admissible; the effect or weight of such evidence, when admitted, to be determined by the jury. See Printing Co. v. Stahl, 23 Mo. App. 451.

A case quite analogous to the one at bar is Sullivan v. Kuykendall, 82 Ky. 483. In that case the parties did not have conversation directly with each other over the telephone, but conversation was conducted by an operator in charge of a public telephone station at one end of the line. It was held that the conversation was admissible in evidence, and that it was competent for the person receiving the message to state what the operator at the time reported as being said by the sender. The court, in the opinion, say: "When one is using the telephone, if he knows that he is talking to the operator, he also knows that he is making him an agent to repeat what he is saying to another party; and in such a case certainly the statements of the operator are competent, being the declarations of the agent, and made during the progress of the transaction. If he is ignorant whether he is talking to the person with whom he wishes to communicate or with the operator, or even any third party, yet he does it with the expectation and intention on his part that, in case he is not talking with the one for whom the information is intended, it will be communicated to that person; and he thereby makes the person receiving it his agent to communicate what he may have said. This should certainly be the rule as to an operator, because a person using a telephone knows that there is one at each station, whose business it is to so act; and we think that the necessities of a growing business require this rule, and that it is sanctioned by the known rules of evidence." Our conclusion is that the court did not err in admitting the testimony of the defendant.

HOW FAR A RAILWAY COMPANY IS CHARGED WITH NOTICE OF THE INCOMPETENCY OF ITS EMPLOYEES IN AN ACTION BY A CO-EMPLOYEE AGAINST THE COMPANY FOR DAMAGES FOR INJURY.

This inquiry grows out of the question of liability of railway companies in actions for damages brought against them by their employees alleged to have sustained injuries directly attributable to the negligence of a fellow-employee.

Upon the bare statement of fact above the courts of England and America have very generally held against a recovery, and the doctrine of *respondeat superior* would not have its full force here, in the absence of some proof of actual notice on the part of the railway company of unfitness of its employee, to whom negligence is directly attributed, in having led to the injury complained of, and this actual notice may be express or implied. What is actual notice in this case may be proved by direct evidence or inferred from circumstances. And one would be charged with actual notice of facts, if he has a knowledge of such facts as would lead a fair and prudent man to make further inquiries, and if such inquiries, if pursued with ordinary diligence, would have given him knowledge of the facts, with notice of which he is sought to be charged. And an implied notice, or constructive notice, technically speaking, would be charged against a person shown to be conscious of having means of knowledge which he does not use, as where he chooses to be voluntarily ignorant, or is grossly negligent in not following inquiries suggested by known facts.[1]

It has become a well established principle that a master is bound to use reasonable care and diligence in the selection of competent

[1] Wade on Notice (2d ed.), § 5; Knapp v. Bailey, 79 Me. 195.

[2] Baube v. New York, etc. R. Co., 59 N. Y. 356; Cleghorn v. N. Y. Cent. R. Co., 56 N. Y. 44; Huntington, etc. R. Co. v. Decker, 82 Pa. St. 119, 84 Pa. St. 419; McDermot v. Han., etc. R. Co., 73 Mo. 516; Harper v. I. & St. L. R. Co., 47 Mo. 567; Pillsbury, etc. R. Co. v. Ruby, 38 Ind. 294; Gilman v. Eastern R Co., 10 Allen (Mass.), 233, 13 Allen, 437; O. & M. R. Co. v. Collarn, 73 Ind. 261; Penn. Co. v. Roney, 89 Ind. 453; Texas M. R. Co. v. Whitemore, 58 Tex. 276; H. & T. Cent. R. Co. v. Myers, 55 Tex. 110; Mobile, etc. R. Co. Smith, 59 Ala. 245; Little Rock, etc. R. Co. v. Duffey, 35 Ark. 602; Atchison, etc. R. Co. v. More, 29 Kan. 632.

and skillful servants, and to discharge on notice or knowledge, or the means of knowledge, any who fail to continue such. I shall cite no authorities on the first part of this proposition, because of its being such well settled law, and because it is merely referred to as a foundation. On the latter part of the proposition above the authorities seem to be quite numerous and in harmony.[2] Implied notice is imputed to one shown to have means of knowledge which he does not use, and the notice may be inferred from circumstances.[3] The railway company was held liable to its employee in the case of Coppins v. New York, etc. R. Co., 122 N. Y. 557, where an injury resulted caused by negligent conduct of a co-employee, who had the habit of neglecting duties and safeguards affecting the injured party, when this conduct was known, or ought, with reasonable care and attention, to have been known by the company. This principle was upheld in numerous other opinions of the same court at an earlier date, and also seems to have been well fixed in the minds of the judges of other States.[4]

It is said, in McMillen v. Saratoga, etc. R. Co., 20 Barb. 449, that a servant, in order to entitle himself to recover for injuries from defective machinery, must prove actual notice of such defects in the railway company. But culpable negligence is sufficient to charge it; that is, such culpable neglect as under the circumstances a prudent man would not be guilty of. The subtle distinctions of modern times will be found to modify very much the broad rules known and followed by Lord Denman and his contemporaries.

In case an employee proves to be incompetent for the duty assigned him, and ordinary care has not been used in his selection, or if he be retained after notice of his incompetency, the employer will be liable to a co-employee whose injury results proximately from the lack of fitness of his fellow-servant, unless the person injured had notice of the incompetency, or had equal opportunities with the employer to obtain such notice.[5] The attitude of the court in this case is certainly fair to both parties concerned. Each party assumes an individual responsibility towards the other, and each charged with notice of his own fault. This is a leading case of its kind, and is well supported by a long line of previous decisions of the same court and others.[6] Justice Mitchell, in giving the opinion in the case of Evansville, etc. R. Co. v. Guyton, above referred to, uses this language: "While the railroad company, in relation to the plaintiff, was not bound to guarantee the absolute fitness of the conductor, it was its duty nevertheless to exercise reasonable and ordinary diligence, having respect for the particular service required, to the end that it might ascertain the qualification and competency of its employee, and whether or not he was fit to be intrusted with the responsible station to which he was assigned." If the company failed in this it would be charged with notice of such disqualification of such employee as ought to have come to its knowledge had it made such inquiry, and the necessity of inquiry on the part of the railway company increases with the degree of responsibility assumed by its employee.[7]

It was held in a recent Michigan case that an employee of a railway company may recover against the company for injuries received through the negligence of an incompetent co-employee, of whose incompetence he had informed the company, when said employee continued at work upon the promise of the company that the employee at fault should not be permitted to perform the acts in which he had shown incompetency.[8]

Where a servant is generally known to be incompetent the master is bound to know it, and is chargeable with negligence in not having such knowledge, if of such a character that he should have known it.[9] When the

[3] Montgomery v. Keppel, 75 Cal. 128; Thompson v. Rioche, 44 Cal. 516; Pell v. McElroy, 36 Cal. 272.

[4] Lake Shore R. Co. v. Stupak, 108 Ind. 1, 41 Am. & Eng. Ry. Cases, 382.

[5] Evansville, etc. R. Co. v. Guyton, 115 Ind. 450.

[6] See Indiana, etc. R. C. v. Daily, 110 Ind. 75; Lake Shore, etc. R. Co. v. Stupak, 108 Ind. 1; Pittsburg Ry. Co. v. Ruby, 38 Ind. 294; Mann v. Delaware, etc. Co., 91 N. Y. 495; Chapman v. Erie R. Co., 55 N. Y. 579; Doris v. Detroit, etc. R. Co., 20 Mich. 105; 65 Barb. 129.

[7] See Wabash, etc. R. Co. v. McDaniels, 107 U. S. 454.

[8] Lyttle v. Chicago, etc. R. Co., 84 Mich. 289. See also 45 N. Y. 521. *Contra*, where no such agreement on the part of the company: Porter v. Western N. C. R. Co., 97 N. C. 66; Chapman v. Erie R. Co., 55 N. Y. 579; Stafford v. Chicago, etc. R. Co., 114 Ill. 244; Mo. Furnace Co. v. Abend, 107 Ill. 44; Kan. Pac. R. Co. v. Peavey, 34 Kan. 472; Dillon v. Union Pac. R. Co., 3 Dill. C. C. 319.

[9] Wood's Master and Servant, § 42; Doris v. Detroit, etc. R. Co. 20 Mich. 105; Gilman v. Easton R. Co., 10 Allen (Mass.), 233.

incompetency arises from the excessive use of intoxicants the rule has frequently been applied.[10]

The case of Chapman v. Erie Ry. Co., 55 N. Y. 579, seems to have construed the rule of notice in these cases more liberally for the railway company, but the weight of authority is against the position of the court in that case. Vigilance is required of the railroad company at all times as the price of immunity from this responsibility. Of course no definite rule can be laid down as to what time must elapse in case of actual notice not shown, to charge a railroad company with negligence in not learning the fact of incompetency of its servants.[11] Good character and proper qualifications once possessed by an employee may be presumed to continue, and the master may rely upon that presumption until notice of a change or knowledge of such facts as would be deemed equivalent to notice is brought to the company's managing officers who have power to act in the matter.[12]

Neither will notice be deemed sufficient if not had by the railroad company in time to investigate facts of unfitness, and to discharge the employee, if necessary.[13] The rule laid down by the court in the case of Frazier v. Penn. R. Co., 38 Pa. St. 104, that proof of special acts of want of skill and capacity on the part of the employee of the company could not be received to charge the company with such notice as to render it liable when such acts of its employee are well known to said company, seems not to hold good in the opinions of other State courts,[14] and single act of negligence would not be sufficient to charge notice.[15]

PERCY EDWARDS.

[10] Hilts v. Chicago, etc. R. Co., 55 Mich. 437; C. & A. R. Co. v. Sullivan, 63 Ill. 293; Laning v. N. Y. Cent. R. Co. 49 N. Y. 521, 13 Allen (Mass.), 433, 10 Allen (Mass.), 233; Chicago, etc. R. Co. v. Doyle, 18 Kan. 58.

[11] 55 Mich. 437. Where notice shown, see 84 Mich. p. 289.

[12] See Chapman v. Erie R. Co. 55 N. Y. 579; Bloke v. Maine Cent. R. Co., 70 Me. 60.

[13] Lake Shore, etc. R. Co. v. Stupak, 108 Ind. 1; Russ v. Chicago, etc. R. Co., 8 Fed. Rep. 544.

[14] 38 Ind. 294, above cited, and cases there cited.

[15] Baube v. New York, etc. R. Co., 59 N. Y. 356, 17 Am. Rep. 325.

VERDICT—REVIEW ON APPEAL—ACCIDENT POLICY—"VISIBLE MARK OF INJURY"—"TOTAL DISABILITY"—NOTICE AND PROOF OF LOSS.

PENNINGTON V. PACIFIC MUT. LIFE INS. CO.

Supreme Court of Iowa, May 23, 1892.

1. In an action on an accident policy, where there was a conflict in the evidence as to the reality of plaintiff's injuries, a verdict for him will not be disturbed.

2. Where plaintiff's injury was a strain, and was not externally visible until shortly after the accident, he was entitled to recover, notwithstanding a provision in the application for insurance to the effect that the policy should not cover injuries of which there was no visible, external mark on the body.

3. Where the policy recites that plaintiff is, by occupation, a "local fireman under classification engineers," a provision that he should have $10 per week for thirty weeks' continuous and total loss "of such business time" as might result from such injuries, refers only to his occupation as fireman.

4. A provision that any claim under the policy should be paid at San Francisco, or (at the company's option) at the general agency through which the policy was issued, was not an agreement that notice and proofs of loss should be made at that city; and where plaintiff transacted the business through one H, who represented himself as general agent of the company, and caused plaintiff to go to Chicago and be examined by a surgeon, who testified that he was the company's surgeon, this was a sufficient compliance with the policy, in the absence of any showing that it was necessary to have transacted the business at any other place.

The plaintiff is by occupation a locomotive fireman. The defendant is a life and accident insurance company, with its headquarters or principal place of business at San Francisco, in the State of California. On the 21st day of May, 1889, the defendant issued to the plaintiff its policy of insurance for the term of one year. The plaintiff claims that on the 2d day of July, 1889, he was, while in the line of his employment, accidentally injured, so that for 30 weeks thereafter he was entitled to receive from the defendant the the sum of $10 per week upon said policy, by reason of the disability resulting from said accident. The defendant denied the liability. There was a trial by jury, and a verdict and judgment for the plaintiff. Defendant appeals.

ROTHROCK, J.: 1. The injury for which the plaintiff sought recovery is stated in his petition in substance as follows: He was a locomotive fireman in the employ of the Chicago, Burlington & Quincy Railway Company, with his residence at the city of Creston, and his run over the railroad was from Ottumwa to Creston. While in the line of his duty on a trip he was violently and accidentally injured by the sudden lurching of the locomotive, "while he was in a strained position, attempting to clean grates of said locomotive, which was part of the duty of said plaintiff as a fireman;" and that by reason of said ac-

cident he was greatly injured in his back, which was so wrenched, bruised, and strained that he was immediately disabled wholly from transacting any and every kind of business in connection with his occupation. The defense interposed by the answer was based upon several grounds. It will not be necessary to set them out in detail, as they are all involved in the points made by counsel in their argument, and will be noticed in the consideration of the case. It is claimed by counsel for appellant that the verdict of the jury is contrary to the evidence, and that a new trial should have been ordered on that ground. It is sufficient to say of this objection to the judgment that a careful examination of the evidence has led us to the conclusion that the judgment should not be reversed upon this ground. It is apparent from the line of argument of appellant's counsel that the cause was resisted in the court below, and is presented to this court at a cost probably equal to the amount involved in the case, on the ground that the plaintiff's claim is a mere sham and pretense, and without merit. That is a feature of the case which we are precluded from determining, because there is a fair conflict in the evidence on every disputed question of fact in the case.

2. We come now to certain questions which arise on the face of the policy, and the application for insurance upon which the policy was issued. These instruments are so voluminous that it is impracticable to set them out at length in an opinion. It is provided in the application that the "insurance shall not cover disappearances, nor injuries of which there is no visible, external mark upon the body of the insured." It is conceded that there is no evidence that there was any visible mark upon the body of the plaintiff at the very time of the injury. It was a strain, and the immediate effects of the injury would not probably be apparent or visible immediately. The court instructed the jury that it would be sufficient for the plaintiff to show that the injury was visible soon after the accident, and as a consequence of the injury. It is contended that this is an erroneous construction of the contract of insurance, and that there was in fact no evidence that there was any visible mark indicating the injury at any time. We think there was evidence from which the jury could fairly find that the effects of the strain were visible within a few days after the accident. There is nothing in the clause of the contract above set out which requires that the effects of the accident shall be visible immediately. Such a construction of the contract would defeat all claims for internal injuries not apparent to the eye at once, and would render such a policy in many cases the means of defeating just claims for indemnity. The contract does not contemplate that there must be bruises, contusions, or lacerations on the body, or broken limbs. See Association v. Barry, 131 U. S. 100, 9 Sup. Ct. Rep. 755. In our opinion, the instruction complained of was correct.

3. Another objection arising on the face of the contract is raised upon the following grounds: The bolicy provides that, where the accidental injury creates disability, the defendant shall pay to the plaintiff "the sum of ten dollars per week, not exceeding thirty consecutive weeks, for the immediate, continuous and total loss of such business time as may result from such injuries." The court instructed the jury upon this feature of the case as follows: "If you believe from the evidence that plaintiff received an injury as claimed by his petition, and that such injury wholly disabled him, and prevented him from following his occupation and performing its duties, and resulted in the total loss of his business time, the defendant will be liable to the payment of a weekly indemnity for the period he was so wholly disabled; provided, you further find from the evidence that plaintiff promptly notified the defendant of the injury, and in all respects performed his part of the contract with reasonable diligence." It is claimed that this instruction is erroneous, because by the terms of the policy the plaintiff was not entitled to any payment whatever, unless his disability was such that he was unable to do any kind of business. We do not think that the clause of the policy above set out is so broad in its meaning as to defeat a recovery if plaintiff was able to do any kind of business. The whole policy must be examined to determine this question. The plaintiff was insured as a railroad employee engaged in the hazardous business of operating railroad trains. The premium for the insurance was paid by an order on the railroad company. It is recited in the policy that the insured "is by occupation local fireman under classification engineers." The reference to "the loss of such business time" has plain reference to the occupation of the insured, and the loss of time in such business means the loss of time in the business of a fireman. It has no reference to the whole range of business pursuits. The case of Lyon v. Assurance Co., 46 Iowa, 631, relied upon by appellant's counsel, is not in point. In that case the obligation was to pay for loss of time while the insured was "totally disabled, and prevented from the transaction of all kinds of business." It will readily be seen that the limitation in the policy in the case at bar is not so comprehensive as in the cited case. It is limited in this case to such business as the plaintiff was engaged in at any time he was insured. It is true that in one of the instructions asked by the defendant the court did charge the jury that the disability must be such as to prevent the plaintiff from all business of every kind. This was in conflict with the instructions given by the court on its own motion. But the conflict worked no prejudice, as the instruction asked was more favorable to the defendant than the case demanded, and the jury evidently followed the rule announced in the instructions limiting the policy to the loss of time in the business or occupation of the plaintiff.

4. Another question presented upon the construction of the written contract is the claim of appellant that the plaintiff was bound by the contract to give notice and make proofs of loss to the defendant at San Francisco. The basis for this claim is found in the application for insurance, and is as follows: "Any claim made under this policy is payable at the company's office in San Francisco, Cal., or (at the option of the company) at the general agency through which the policy is issued." This is not a requirement that the notice and proofs of loss shall be made at the company's office at San Francisco. The plaintiff transacted this part of the business with one Herrick, the general agent of the defendant at the city of Chicago. The record contains letters written by Herrick to the plaintiff in which he designates himself as general agent of the defendant, and there is nothing in the whole record from which it can be implied that it was necessary to give notice or proofs of loss at any other place. On the contrary, the plaintiff made a trip to Chicago at Herrick's request, and by Herrick's procurement plaintiff was examined by two surgeons, one of whom testified as a witness that he was the defendant's surgeon for the State of Illinois, and that he made the examination of plaintiff in that capacity. In view of these facts, it should be conceded that the plaintiff applied at the proper place for an adjustment of his claim, and there was no error in the instructions to the jury on this question, nor in admitting in evidence the correspondence between himself and the company's office at Chicago.

5. There are other questions of minor importance. They relate to alleged errors in the rulings of the court on objections made to the introduction of evidence. One of these is that the plaintiff was permitted in his examination as a witness in rebuttal to state a conversation had with an attorney in Chicago to whom he was taken by the defendant's agents, in which the attorney called the plaintiff a liar, and stated that lawyers in the west did not have any sense, and that he would bulldoze the plaintiff out of his claim. It is claimed that this evidence should have been excluded. The plaintiff filed an additional abstract, in which it is shown that the defendant moved to exclude the evidence, and the motion was sustained. This abstract is not denied. It therefore appears that this evidence was, by order of the court, withdrawn from the consideration of the jury. We do not determine whether the evidence was material.

6. Another objection is made to the refusal to permit a witness to answer a question propounded by defendant's counsel. The record shows that the witness was afterwards permitted to answer the identical question without objection. The foregoing discussion disposes of every material question in the case, and leads us to the conclusion that the judgment of the district court should be affirmed.

NOTE.—*Total Disability.*—All the accident insurance companies, and most of the fraternal orders, are now paying benefits for total or partial disability of the insured, ranging from a third of the face of a policy in case of partial disability to the full face thereof in case of total disability.

In case of partial disability it is not hard to determine the liability of the company, as the contract usually states in precise language the loss for which it will be liable. But in claims for total disability it is different, as each issue must stand in the light of its own evidence; and it often becomes a delicate question to decide where the line of partial disability ends and that of total disability commences.

Most accident policies, and some fraternal orders, now promise to pay part or the whole, of the sum insured, if the insured shall, by reason of accidental injuries, "suffer the loss of the entire sight of both eyes, or the loss of two entire hands, or two entire feet, or one entire hand and one entire foot." What was meant by this clause was construed by the Supreme Court of Wisconsin in Sheanon v. Pacific Mutual Life & Acc. Co., 46 N. W. Rep. 799. There it appeared that the plaintiff was shot in the back while attempting to escape from a saloon quarrel, commenced by other parties, in which he had no part; and the ball pierced his spine and produced an immediate and total paralysis of the lower part of his body, and entirely destroyed the use of both feet. The court say: "The question is, what does it" (the clause above recited) "mean, or what must be understood by it? Is its meaning that the insured is not entitled to recover the insurance money unless his legs and feet have been amputated or severed from his body, or does it mean that the injury has destroyed the entire use of his legs and feet so that they will perform no function whatever? The contention of the learned counsel for defendant is that the clause is to be understood in the former sense, and implies an amputation or physical severence of the feet from the body, and does not include an injury such as paralysis, though such injury actually deprives the insured of the use of his feet and legs. We cannot adopt such a construction of the contract. To our minds the loss of the hands and feet, embraced in the policy, is an actual and entire loss of their use as members of the body; and if their use is actually destroyed so that they will perform no function whatever, then they are lost as hands and feet. · · · The expression 'loss of feet' would generally be understood to mean loss of use of these members; and if the lower portion of the plaintiff's body and his feet are completely paralyzed, and he is permanently and forever deprived of their use, he has suffered 'a loss of two entire feet,' within the meaning of the policy."

This case decides a question new in insurance law. After the decision was announced the company involved, as also most, if not all other companies interested in the question, altered their policy forms so that they now read loss of both feet "by severance above the ankle."

A number of courts have held that, in order to recover for "total disability," it is not required that the insured should be absolutely incapacitated from doing anything whatever, but is sufficient to make out a case, to show that he is not able to do his customary work in his customary manner.

Thus, in Walcott v. United Life & Acc. Ass'n., 8 N. Y. Supp. 263, in Supreme Court of New York, the insured, a medical practitioner, having in charge a general practice, received a fall, resulting in an injury to his hip. He, thinking he had recovered, claimed, and

was allowed, for two weeks' total disability. Soon after he was again prostrated from the injury for a period of four weeks, and was unable to go upon his rounds, or visit any patients. He did, however, during this time, as well as during the first two weeks of his confinement, occasionally permit a patient to come to his bedside, when he would make some examination, and at times reached for, or received certain medicines in his room, which he advised to be administered, but never, so far as the evidence shows, did he leave his bed during this time. After saying that the giving of the first receipt did not estop the insured to prosecute this action, the court say: "Total disability must, of the necessity of the case, be a relative matter, and must depend largely upon the occupation and employment in which the party insured is engaged. One can readily understand how one who labors with his hands would be totally disabled when he cannot labor at all. But the same rule would not apply to the case of a professional man whose duties require the activity of the brain, and which is not necessarily impaired by serious physical injury. If a person engaged in the general practice of medicine and surgery is unable to go about his business, enter his office, and make calls upon any of his patients, but is confined to his bed, as in this instance, and enabled to only exercise his mind on occasional applications to him for advice, he may be said to be totally disabled within the meaning of the provisions of this policy."

And so a farmer was allowed to recover as for total disability where it was made to appear that he was unable to do the ordinary and customary work on the farm, although he was able to milk and do light work on the farm. Sawyer v. United Causualty Co. (Superior Ct. of Worcester), 1 Big. 289; Hooper v. Accidental Death Ins. Co., 5 H. & N. 545.

In Young v. Travelers' Ins. Co., 80 Me. 244, 13 Atl. Rep. 896, the clause was "if the insured shall sustain bodily injuries · · · which shall · · · immediately and wholly disable and prevent him from the prosecution of any and every kind of business pertaining to the occupation under which he is insured," etc. The insured was a billiard saloon-keeper. The assured admitted that he could do some of the acts of his position, bnt was wholly disabled from doing many of the material acts necessary to be done in the business. The assured was allowed to recover. After stating the rule to be as stated in the cases *supra*, the court say: "He was not required to prove his injury disabled him to such an extent that he had no physical ability to do what was necessary to be done in the prosecution of his business, but it was sufficient if he satisfied them"—the jury "that his injury was of such a character, and to such an extent, that common care and prudence required him to desist from his labors and rest as long as it was reasonably necessary to effectuate a speedy cure—so that a competent and skillful physician called to treat him would direct him so to do."

But the courts are not unanimous in the above ruling. In the case of Ford v. United States Mutual Acc. Relief Co., 148 Mass. 153, 19 N. E. Rep. 169, the insured was classed in the policy as "leather cutter and merchant." The policy provided that, "if the insured should sustain bodily injuries · · · which shall immediately and wholly disable and prevent him from the prosecution of any and every kind of business pertaining to the occupation under which he is insured," then he is to be indemnified. The insured received injuries wholly disabling him as a leather cutter, but not as a merchant. The court say: "To be entitled to recover a weekly indemity, he must be wholly disable from the prosecution of every and any kind of business pertaining to the occupation under which he is insured; that is, the two-fold occupation of leather cutter and merchant; · · · he must show a disability both as a leather-cutter and a merchant."

I do not see how this case can be reconciled with the cases holding that, if the insured is not able to do all the kinds of his work in his customary manner, he is entitled to recover. In the light of this rule it certainly seems that the ruling should have been that, if the insured were wholly disabled from pursuing either of the occupatious under which he was insured, he would be entitled to recover.

Another case not readily reconcilable with the first class of cases is Gracey v. People's Mut. Acc. Ins. Ass'n. (Pittsburg Ct. Com. Pleas), 21 Pitts. L. J. 25. There the insured was classed as a manufacturer. He received a fall on the ice, breaking his arm, causing him to carry it in a sling. The injury and pain was such as to prevent him from lying in bed; and the only sleep he obtained for several weeks was in a chair. He was able to go to his factory and give a few general orders, but was not able to remain any length of time. The court held that he was not wholly disabled "from the prosecution of any and every kind of business pertaining to his occupation." Saveland v. Fidelity & Casualty Co., 67 Wis. 174.

A case directly in conflict with these last two cases, as it seems to me, was recently decided by the New York Supreme Court—Neafie v. Manufacturers' Acc. Indemnity Co., 55 Hun, 111, 8 N. Y. Sup. 202. There the insured was classed in the policy as "by profession, occupation or employment an ice-man (proprietor)." The insured at times helped in delivering ice, and while so engaged received an injury which disabled him from engaging in the delivery of ice, though he was able to be about and give general directions as to his business. Under his policy insured was to receive indemnity during total disability. The court held that he was totally disabled within the meaning of the policy.

The precise clause of the policy in this case, is not set out in the opinion, but we presume it to be the usual one, granting indemnity during total disability to follow his usual occupation.

In Lyon v. Railway Passengers Assurance Co., 42 Iowa, 631, the provision was to pay while the insured was "totally disabled and prevented from the transaction of all kinds of business," etc. The trial court instructed the jury that "the fact that there may be some business or occupation in which he could engage would not prevent a recovery, unless it was an occupation or business which he was qualified to engage in as an occupation and transact in the usual way." In declaring such instruction erroneous the supreme court say: "The parties must be bound by the terms of their contract. The contract of insurance provided that the defendant will indemnify the assured against loss of time while totally disabled and prevented from the transaction of all kinds of business solely by reason of bodily injuries. · · · Almost total soundness and ability, instead of total disability, is made the condition of the plaintiff's right to recover and of defendant's liability. The plaintiff is a carpenter. If he was simply disabled from going upon a four-story building to put on a roof, and could do everything else pertaining to his trade, he would, under this instruction, be entitled to recover during the period of such disability. This is not the proper construction of the agreement. It interpolates into it terms and conditions upon which the parties never agreed, and attaches to the words

employed a meaning of which they are not susceptible." See Rhodes v. Railway Passenger Assurance Co., 5 Lans. 71, to the same effect.

I think the instruction of the trial court more nearly correct than is the decision of the appellate court. It is hard to imagine a man so totally disabled as not to be capable of engaging in some business. And it certainly seems to me that when a man is insured against total disability, and classed as a "carpenter" or in any other occupation, the intent should be construed as insuring him against any accidental injury which would disable and prevent him from pursuing his occupation as a carpenter, and from pursuing it in a manner to enable him to do a carpenter's work in the customary manner.

In Albert v. Supreme Council of the Order of Chosen Friends, 34 Fed. Rep. 721, the language of the by-law was that the insured should be prevented "from following any occupation whereby he or she can obtain a livelihood." The insured, a barber, received an injury which prevented nim from following his occupation of barber, but he opened a restaurant, and thereby made a living; and the court held, on demurrer to answer averring such facts, that the fact that the insured was obtaining a living from his business as a restaurant keeper was a good defense to the action, although the plaintiff was disabled from following his occupation of barber.

This case, however, is readily distinguished from the others, and brings no confusion into the decided cases on the subject. The clause "follow any occupation whereby he can obtain a livelihood," being sufficiently definite to cover his obtaining a livelihood in his usual or any other occupation.

Where the provision is to grant indemnity during "total inability to labor," if the insured is unable to gain a livelihood at the particular labor at which he was employed at the time of the accident, yet he was able to earn as much, or more, money at some other employment, he cannot recover. B. & O. Relief Ass'n v. Post, 122 Pa. St. 579, 15 Atl. Rep. 886.

This is another case readily distinguishable from those granting indemnity while disabled "from any and every kind of business pertaining to his occupation." For "total inability to labor" must mean inability to labor at any occupation. Rights under such a contract are readily determined.

A case which has puzzled me every time I have had occasion to refer to it, is Knapp v. Preferred Mut. Acc. Ass'n (New York Supreme Court), 6 N. Y. Supp. 57, 53 Hun, 84. There the plaintiff was insured against disability which should "wholly disable and prevent him from the prosecution of every and every kind of business pertaining to the occupation under which he receives membership." The plaintiff was insured as a "retired gentleman," having no occupation but to amuse himself; he testified that he had a shop at home where he sometimes amused himself; that his income was derived from investments, and was a director of a wagon company and at times used some of its machinery with his amusement. While operating a buzz-saw at the wagon shops he received a wound which deprived him of the use of his hand for sometime. The court held that he was not disabled from any and every kind of business pertaining to his occupation.

This decision is probably right in the light of the decided cases; but what puzzles me is, to imagine under what circumstances a "retired gentleman" may be said to be totally disabled from pursuing "any and every kind of business" pertaining to his "occupation." Having no occupation, how is he to get indemnity for loss of time? He certainly is entitled to indemnity. The company admits this when it takes his money, putting such a clause in his policy. But I confess that I am unable to imagine a case wherein he could recover under a strict construction of the contract.

It is to be regretted that the courts are not more unanimous in their construction of this clause in the policy. It is an open one in nearly all the States, and the authorities being divided as they are, it is a delicate question for counsel to advise a client upon. Perhaps the fault is not so much with the court as with the policy writers of the companies. The policy writer should strive to use language, plain and unambiguous, which should leave no room for construction by the court. It would be an easy matter to add a clause to the policy to the effect that the insured should not be considered as totally disabled if he should be able to perform any part of the duties of the occupation under which he is insured, or the duties of any other occupation. Such is the intention of the companies, and they must learn to so state in their policies or the court will continue to construe the contract according to their notion of right, which is, to give the greatest indemnity permissible under the contract to the insured.

JOHN A. FINCH.

Indianapolis, Ind.

CORRESPONDENCE.

PUNISHMENT FOR SALE OF INTOXICATING LIQUORS.

To the Editor of the Central Law Journal:

Your editorial note on the beginning of the 19th year of the JOURNAL, in the number of July 1st, is common sense and unpretentious. But the very first article following it, is, I think very *un*common sense, for various reasons. Your view a s contained in the article is poor law. It appears that the laws of Vermont do not allow the sale of liquors within the State. That is a law that everybody ought to respect as much as any other that is in force. If so, the New York liquor dealer ought to sell his liquor in New York; and if the Vermont purchasers can't or won't pay for it until they receive it, then the New York dealer ought to either make the sale in New York and ship to the purchaser, and trust him to pay, or else he ought to refuse to ship at all. Either of these he can do and not violate the law. But by shipping as he did he violated the Vermont law solely to protect himself, and because he was given the penalty of the very law he violated in attempting to protect his own personal interests, you say "the action of the court resulted in great hardship and substantial wrong." For you to assume that the aggregated penalties for O'Neil's violation of the Vermont law is "a great hardship," in the face of the fact that the Vermont people don't want liquor sold in their State, is to utterly ignore the evil consequence of the sale of liquor, and the almost certain cruelty and brutal treatment that much liquor will bring to the 307 otherwise peaceful and happy homes it has destroyed, as well as to ignore the will of the people of Vermont. You had as well criticise any other law they have enacted that carries with it a penalty. We can't value happiness and the peace of our wives and children by dollars and cents, but we can protect them from this infamous liquor traffic by penalties and imprisonment, and when it is done the principle of the action that so protects should be applauded; and instead of condoling with the violators of law and the robbers of the happiness of our homes you

ought to congratulate the people on the step forward the country has taken, and the courts for the arms of protection they have thrown around the loved ones at the fireside, and for the peace and purity their judgments and decrees establish and maintain. Your article is along the wrong line. The world has progressed too far for such men as the editor of your valuable and influential journal to apply "cruel and unusual treatment" to violators of law. The "cruel" treatment is on the side of the thousands of broken-hearted mothers and wives—the effects of the violation of the law by such men as O'Neil; and the "unusual" thing is to think that the courts or people either will put up with any tampering with such sacred rights. The dawn of a new era is here. As a people we have stepped up one step higher on the plain of morality, and the real thought of the age is toward that spiritual plain where Christ stood and of which he spake when he said, "peace on earth and good will toward men."

G. W. SHINN.

BOOKS RECEIVED.

The Law of Electric Wires in Streets and Highways. By Edward Quinton Keasbey, of the New Jersey Bar. Chicago: Callaghan & Co. 1892.

Public School Law of the United States, as Administered by the Courts. With Appendix, Containing Synopses of Principal Statutes of each State. By Irwin Taylor, of the Topeka Bar, Author of Kansas Digests, Colorado Digest, Pleading and Practice, General Statutes of Kansas, etc. Topeka, Kansas: Geo. W. Crane & Co., Printers & Binders 1892.

The American State Reports, Containing the Cases of General Value and Authority Subsequent to those Contained in the "American Decisions" and the "American Reports," Decided in the Courts of Last Resort of the Several States. Selected, Reported, and Annotated. By A. C. Freeman, and the Associate Editors of the American Decisions." Vol. XXV. San Fransisco: Bancroft-Whitney Company, Law Publishers and Law Booksellers. 1892.

HUMORS OF THE LAW.

A witness in a criminal case while giving his testimony turned to the jury, whereupon the prisoner flew into a passion and shaking his fist at the jurymen, shouted, "Set of boobies! asses, pack of idiots?" Upon which the judge, interrupting him, said, "Do not speak to the jurors; address your objections to the court.

Client—You have an item in your bill, "Advice, Jan. 8, $5." That was the day before I retained you.

Lawyer—I know it. But don't you remember, on the 8th I told you you'd better let me take the case for you?

Client—Yes.

Lawyer—Well, that's the advice.

A small Scotch boy was summoned to give evidence against his father, who was accused of making disturbances in the streets. Said the bailie to him: "Come, my wee mon, speak the truth, and let us know all ye ken about this affair." "Weel, sir," said the lad, "d'ye ken Inverness street?" "I do, laddie," replied his worship. "Weel, ye gang along it and turn into the square, and cross the square—"

"Yes, yes," said the bailie, encouragingly. "An' when ye gang across the square ye turn to the right, and up High street, and keep on up High street till he come to a pump." "Quite right my lad; proceed," said his worship; I know the old pump well." "Well," said the boy, with the most infantile simplicity, "ye may gang and pump it, for ye'll no pump me."

An eminent judge, who was trying a right-of way case in England, had before him a witness—an old farmer—who was proceeding to tell the jury that he had "knowed the path for sixty year, and my feyther tould I as he heered my grandfeyther say—"

"Stop!" said the judge; "we can't have any hearsay evidence here.

"Not?" exclaimed Father Giles. "Then how dost knaw who thy feyther was 'cept by hearsay?"

After the laughter the judge said: "In courts of law we can only be guided by what you have seen with your own eyes, nothing more or less."

"Oh, that be blowed for a tale," replied the farmer. "I ha'a bile on the back of my neck, and I never seed un; but I be ready to swear that he's there, I do."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

ALABAMA.....37, 124
CALIFORNIA.....3, 50
COLORADO.....2, 10, 24, 33, 41, 88, 107, 115, 125
GEORGIA.....21, 105
ILLINOIS.....64
IOWA 1, 11, 29, 31, 32, 35, 57, 65, 66, 72, 84, 86, 90, 92, 93, 94, 97 98
KANSAS.....14, 17, 18, 26, 45, 60, 83, 114
KENTUCKY.....53, 54, 62, 71, 87, 100
MARYLAND.....5, 40, 112, 116
MASSACHUSETTS.....27, 28, 68, 69, 77, 89
MICHIGAN.....9, 25, 47, 49, 61, 110, 118
MINNESOTA.....43, 44, 91, 109
MISSISSIPPI.....16, 22, 39, 46, 70, 113
MISSOURI.....7, 52, 78, 106, 122, 123
NEBRASKA.....8, 55, 63, 74, 76, 103
NEW JERSEY.....12, 34
SOUTH CAROLINA.....4, 20
SOUTH DAKOTA.....99
TENNESSEE.....102
TEXAS.....36, 38, 42, 48, 50, 95, 117
UNITED STAEES C. C.....56. 85, 111
UNITED STATES C. C. OF APP.....23, 73, 96
UNITED STATES D. C.....19, 51
UNITED STATES S. C.....6, 13, 30, 80, 101
UTAH.....121
WASHINGTON.....58, 79, 81, 82
WISCONSIN.....15, 67, 75, 104, 108, 119, 120

1. ADMINISTRATION—Election—Homestead. — Code, § 2440, provides that a surviving wife is entitled to have a third of her husband's real estate set off to her in fee-simple as her distributive share. Section 2007 provides that she may continue to occupy the homestead until it is otherwise disposed of. Section 2008 provides that she may elect to take the homestead for life in lieu of her distributive share in the real estate: Held, that occupancy of the homestead creates no presumption of an election to take the same in lieu of a distributive share, until such occupancy has been continued after a reasonable time.—EGBERT v. EGBERT, Iowa, 52 N. W. Rep. 478.

2. ADMINISTRATION — Estoppel. — Where a judgment creditor of an estate with ample assets to satisfy its debts receives from the heir, in consideration of her

postponing enforcement of her judgment, one of several notes, secured by deed of trust upon land, and given the heir for a debt due the estate, and it is agreed that upon prompt payment of the note and interest when due she will "cancel and release" and give "a clear receipt for said judgment," she was not compelled, on non-payment of the note, to enforce its collection, and failure to do so did not estop her from enforcing the judgment.—DOWLING v. DOWLING, Colo., 30 Pac. Rep. 50.

3. ADMINISTRATION—Executors and Administrators.—Where an executor qualified and acted for more than 20 years under his appointment, on appeal from his final settlement he will not be allowed to dispute the recitation in his appointment that citation to the heirs was issued and served.—IN RE MOORE'S ESTATE, Cal., 30 Pac. Rep. 106.

4. ADMINISTRATION—Sale of Decedent's Land.—In the absence of any provision in an order of the probate court directing a sale of land, the sheriff has no authority to insert in the deed a life interest with remainders over, and the sale is presumed to be a sale in fee.—ISEMAN v. MCMILLIAN, S. Car., 15 S. E. Rep. 336.

5. ADMINISTRATION — Sale of Leasehold Interest.—A leaseholder conveyed his interest by a deed on its face in fee to the mother of plaintiff's intestates and their sister, who, on the title, becoming vested in them, repudiated the title before it had ripened into a title by adverse possession, and procured from their mother's grantor a conveyance of the land as a leasehold; Held, that the latter conveyance was inoperative, and plaintiff's intestate could only claim under the original conveyance which conveyed such title only as the grantor had, and that, administration not having been taken out on the mother s estate, an administration sale of intestate's interest in the land was premature.—BARNITZ v. REDDINGTON, Md., 24 Atl. Rep. 409.

6. ADMIRALTY—Action in Rem for Death.—No action *in rem* lies for damages incurred by loss of life, though by the local law a right of action survives to the administrator or relatives of the deceased, unless a lien is expressly created by such local law.—THE CORSAIR, U. S. S. C., 12 S. C. Rep. 949.

7. ADVERSE POSSESSION—Grantor in Trust Deed.—A trust deed to secure certain bonds running for a term of years provided that the lands conveyed should remain subject to the trust until discharged as therein provided, and contained a provision that, "the said lands shall be deemed and taken to be in the legal possession and control of the trustees as in case of absolute title in fee-simple:" Held, that the actual possession of the trustor or mortgagor was not adverse to the rights of the trustee, the relations between such parties being one of trust and confidence, and not of hostility.—CHOUTEAU v. RIDDDE, Mo., 19 S. W. Rep. 814.

8. APPEAL FROM JUSTICE—Judgment —Where an action upon an account is tried before a justice of the peace, and appealed to the district court, and the judgment of the justice affirmed, it is the duty of the district court to render judgment against both the principal debtor and the surety on the appeal undertaking.—BANGHART v. LAMB, Neb., 52 N. W. Rep. 399.

9. ASSAULT—Damages.—In an action for assault, it is error for the court to charge that the jury may award damages beyond compensation for the injury done, and punish defendant by compelling him to pay "smart money;" all that plaintiff can recover being enough to compensate him for the wrong suffered.—STUYVESANT v. WILCOX, Mich., 52 N. W. Rep. 465.

10. ASSIGNMENT FOR BENEFIT OF CREDITORS.—Creditors, who have not accepted and become invested with the debtor's assets under an assignment for benefit of creditors, can pursue their remedies as such by attachment and execution.—ELLIOTT v. HOBBS, Colo., 30 Pac. Rep. 54.

11. ASSIGNMENT FOR BENEFIT OF CREDITORS.—Where an insolvent debtor has no intention, until several days after executing mortgages on part of his property to some of his creditors, of making a general assignment for the benefit of creditors, the mortgages will not render the assignment void as giving preference.—CLEMENT v. JOHNSON, Iowa, 52 N. W. Rep. 502.

12. ASSIGNMENT FOR BENEFIT OF CREDITORS—Preferences.—A debtor in failing circumstances executed to a favored creditor a deed of conveyance of all his landed property, a bill of sale of all his personal property, and an assignment of all his choses in action, taking from the creditor a declaration in writing that he held the property for the purpose of paying the amount due himself, and the remainder for the benefit of the other creditors of the grantor: Held, (1) that the transaction amounted to an assignment for the benefit of creditors, and was void because it created a preference.—STITES v. CHAMPION, N. J., 24 Atl. Rep. 408.

13. ASSIGNMENT FOR BENEFIT OF CREDITORS—Preference.—Code Md. 1888, art. 47, §§ 14, 22, providing that all conveyances preferring creditors made by an insolvent within four months before the commencement of proceedings in insolvency shall be void, is a usual and valid exercise of the power of the State over property within the jurisdiction, as to all such conveyances made after the passage of the law, though the creditors preferred resided without the State and were creditors on contracts to be performed without the State.—BROWN v. SMART, U. S. S. C., 12 S. C. Rep. 958.

14. ASSIGNMENT FOR BENEFIT OF CREDITORS—Validity.—Where the general form and nature of an instrument executed by an insolvent debtor to a trustee for the benefit of his creditors is that of a general assignment, it should be so regarded, and a provision therein, directing the trustee to distribute the estate in a manner inconsistent with the statute relating to general assignments, will not avoid the conveyance, but should be treated as a nullity by the assignee, and the estate distributed by him as the statute prescribes.—BRIGHAM v. JONES, Kan., 30 Pac. Rep. 113.

15. ATTACHMENT—Petition in Insolvency.—Under Rev St. § 4298, providing that the assignment in insolvency proceedings shall vest in the assignee only the interest of the insolvent "at the time of executing the same," an attachment, levied after defendant has filed a petition in insolvency, but before actual assignment, gives the attaching creditor priority over other creditors.—ROBINSON BROS. SHOE CO. v. KNAPP, Wis., 52 N. W. Rep. 431.

16. ATTACHMENT—Removing Effects out of State.—A debtor who ships his property to consignees without the State, for the purpose of raising a fund against which he may draw for the payment of debts, which debts are due to persons other than the consignees, is liable to an attachment against his estate, on the ground that he has removed his property without the State.—CROW v. LEMON & GALE CO., Miss., 11 South. Rep. 110.

17. ATTACHMENT—Service by Publication.—In an action against non-residents, in which an order of attachment is issued at the time of the filing of the petition, and their real estate is attached, an affidavit for service by publication must be filed, and the first publication made within 60 days from the date of the filing of the petition and other necessary papers. If affidavit for constructive service and the first publication thereof is not made for more than 13 months after the filing of the petition and the issue, levy, and return of the order of attachment, an action has not been commenced and an order of attachment cannot be issued and served.—JONES v. WARNICK, Kan., 30 Pac. Rep. 115.

18. ATTACHMENT—Surety on Redelivery Bond.—In an attachment case, one who has signed a redelivery bond as surety is estopped from claiming the property as against the officer taking the bond and the attaching creditor; and the fact that such surety was induced to sign said bond by a misrepresentation of the attaching officer, as to the legal effect of the signing of said bond, will not avoid the estoppel created thereby.—PETERSON v. WOOLLEN, Kan., 30 Pac. Rep. 128.

19. ATTORNEY—Dismissal by Receiver.—The receiver of an insolvent bank may at any time dismiss an attorney employed by him, regularly or otherwise, to prosecute claims of the bank, and employ another in his place, whom the court will, by order, substitute in the place of the dismissed attorney, except as to such cases as the latter may have commenced and finished. —IN RE HERMAN, U. S. D. C. (Wash.), 50 Fed. Rep. 517.

20. ATTORNEY AND CLIENT — Contract. — A party to pending litigation changed her attorney, and an order was made in the cause substituting others in his place, and referring the question of what agreement existed between such party and her attorney as to certain fees and compensation for his services therein, which were in dispute: Held, that the finding of the referee that there was no contract concludes the court under the rule that a claim for professional services rests upon contract.—BOYD V. LEE, S. Car., 15 S. E. Rep. 332.

21. BURGLARY.—The ownership of personal property, in an indictment for larceny, may be laid in a bailee having possession of the property when it was stolen, though the bailment was gratuitous. A like description of ownership of personal property mentioned in an indictment for burglary is sufficient.—WIMBISH V. STATE, Ga., 15 S. E. Rep. 325.

22. CARRIERS—Passengers—Injuries.—A railroad company is liable for unprovoked insult and injuries to passengers by his fellow-passengers, provided the conductor of the train had notice that such insult and injury were threatened, and, with the assistance of employees and willing passengers, could have prevented the same.—ILLINOIS CENT. R. CO. V. MINOR, Miss., 11 South. Rep. 101.

23. CARRIERS OF PASSENGERS — Connecting Lines.—Where a second-class railway ticket provides that "no agent or employee has power to modify this contract in any particular," neither the ticket agent nor baggage master at a station where the holder is required to change cars has anthority to instruct such passenger to take a limited express train, upon which only first-class tickets are accepted.—NEW YORK, L. E. & W. RY. CO. V. BENNETT, U. S. C. C. of App., 50 Fed. Rep. 496.

24. CHATTEL MORTGAGES — Attachment. — Where a chattel mortgagee has not asserted his title upon maturity of the debt, the mortgage is void and inoperative against a creditor who has proceeded by attachment and levy against the mortgaged property.—ELLIOTT V. FIRST NAT. BANK OF COLORADO SPRINGS, Colo., 36 Pac. Rep. 53.

25. CHATTEL MORTGAGES — Error in Recording. — Knowledge of an attorney of the existence of a chattel mortgage, which by mistake was not filed in the proper office, is notice to his client, who has a prior book account against the mortgagee, which was put in judgment subsequent to such filing.—LITTAUER V. HOUCK, Mich., 52 N. W. Rep. 464.

26. CHATTEL MORTGAGES. — Recordation.— The constructive notice imparted by the registration of a chattel mortgage in the county and State where executed is not confined to that county and State, but protects the interests of the mortgagee when the property is removed by the mortgagor to another State, by the law of comity between States.—ORD NAT. BANK V. MASSEY, Kan., 30 Pac. Rep. 124.

27. CHECK. — A *bona fide* holder of a post-dated check who was told at the time he bought it from the payee that it had been given on agreement that the payee should not use it until the day of its date is not bound to understand by the word "use" that the check was not to be transferred before that date.—BILL V. STEWART, Mass., 31 N. E. Rep. 386.

28. CHECK—Demand for Payment.—Where the drawer of checks had no funds in the hands of the bank, and knew they would not be paid if presented, it was not necessary, before commencing action on the checks, to present them to the bank for payment.—BEAUREGARD V. KNOWLTON, Mass., 31 N. E. Rep 389.

29. CONFLICT OF LAWS—Contract.— The secretary of defendant, an Iowa insurance company, not authorized to do business in Nebraska, while there solicited the insurance of plaintiff, a resident thereof, whereupon an application and premium notes were signed payable at C, Iowa, the home office, from which place a policy was thereafter issued payable in Iowa: Held, that the contract of insurance was made and completed in Iowa, and must be construed by Iowa laws.—MARDEN V. HOTEL OWNERS' INS. CO., Iowa, 52 N. W. Rep. 509.

30. CONSTITUTIONAL LAWS— Vested Rights.—The right of a judgment creditor in Tennessee, prior to 1879, to seize the rents and profits of property belonging to his debtor's wife, was not, as to future profits, either a vested or contract right, and Act March 26, 1879, taking away such right, was not in contravention of any provisions of the federal constitution. — NEILSON V. KILGORE, U. S. S. C., 12 S. C. Rep. 943.

31. CONTRACT—Breach— Minor.— G and R agreed that the former's infant daughter should reside with and serve the latter's family till she reached the age of 18, she to be clothed, fed, educated, and treated as a member of R's family, and to receive certain described chattels for her services on her reaching the age designated: Held, where the infant entered upon the performance of the contract, an l continued to perform until she was compelled by R to leave his home, that she, though a minor, could maintain an action for a breach thereof. — GOODEN V. RAYL, Iowa, 52 N. W. Rep. 506.

32. CONTRACT—Liquidated Damages.—A contract for the erection of a building by L for W provided that, if L should fail to comply with it as to the time within which the work was to be completed, he should forfeit $10 per day until its completion, subject to the discretion of W, which sum should be deducted from any money due him, and, if that amount was not due, then L agreed to pay the same: Held that, in the absence of evidence as to the rental value of the entire cost of the building, the provision would be considered one of liquidated damages, and not for a penalty.—DE GRAFF, VRIELING & CO. V. WICKHAM, Iowa, 52 N. W. Rep, 503.

33. CORPORATIONS — Directors. — Directors of a corporation are not entitled to compensation for their services as directors, unless such compensation is provided for or expressly sanctioned by the charter.—BROWN V. REPUBLICAN MOUNTAIN SILVER MINES, LIMITED, Colo., 30 Pac. Rep. 66.

34. CORPORATIONS—Inspection of Books.—Revision, p. 186, § 50, which provides that the chancellor or any justice of the supreme court may order the books of a corporation of this State to be brought within the State, and kept therein, at such place and for such time as may be proper: Held that, on a petition to have the books of a corporation brought into the State for inspection, it was no defense that petitioner was president and director of the corporation, and presumed to already know all that could be learned from an inspection of the books.—MITCHELL V. RUBBER RECLAIMING CO , N. J., 24 Atl. Rep. 407.

35. COVENANTS — Breach.—A purchaser of land, who buys in and holds as assignee a prior mortgage covering that and other land, cannot recover therefor in an action for breach of his vendor's covenant against incumbrances until he has exhausted his remedy on such mortgage by foreclosure or otherwise. — HARWOOD V. LEE, Iowa, 52 N. W. Rep. 521.

36. CRIMINAL LAW—Burglary and Theft.— Pen. Code, art. 712, provides that if a house be entered so as to constitute burglary, and the burglar "shall after entering, commit theft or any other offense, he shall be punished for burglary, and also for whatever other offense is so committed:" Held, that burglary and theft committed by one person in the same transaction can be punished as separate offenses.—RUST V. STATE, TEX., 19 S. W. Rep. 763.

37. CRIMINAL LAW—Embezzlement.— Where the office

of defendant bank president gives him a joint or concurrent possession of the bank's money with the cashier or other officer, and while so in possession he, either alone or jointly with such other officer, fraudulently converts such money to his own use, he is guilty of embezzlement, with the meaning of the statute.—REEVES v. STATE, Ala., 11 South. Rep. 158.

38. CRIMINAL LAW — Forgery of Order.—One may be convicted of forging an order, though the name of the person purporting to draw it appears at the beginning instead of the end, of such an order would bind the drawer.—CRAWFORD v. STATE, Tex., 19 S. W. Rep. 766.

39. CRIMINAL LAW—Homicide.—In a trial for murder, the court erred in instructing the jury that every killing with a deadly weapon was presumed to be malicious, and that the burden was on defendant to show that he was in immediate, real, or apparent danger of his life or great bodily harm from deceased.—HANSFORD v. STATE, Miss., 11 South. Rep. 106.

40. DECEIT— Sale of Stock.—In an action against the shareholders and officers of a corporation for misrepresentation and deceit in the sale of shares of stock to plaintiff, omissions or neglect of the corporation to comply with the provisions of the statute in regard to r ceiving property for subscriptions to stock, and making and recording statements of the affairs of the company, constitute no ground for recovery.—ROBINSON v. PARKS, Md., 24 Atl. Rep. 411.

41. DEDICATION — User. — Where a road runs through private lands, its dedication as a public highway may be implied.—STARR v. PEOPLE, Colo., 30 Pac. Rep. 64.

42. DEED—Married Woman's Acknowledgment— Authority to take Acknowledgment—De Facto Deputy.—Under Sayles' Civil St. art. 4313, requiring the certificate of a married woman's acknowledgment to show that she acknowledge the instrument to be "her act and deed," and declared that she "willingly signed" it, and that she "did not wish to retract it," it is sufficient that it recite that she declared she signed it of her own free will and accord, and wished not to retract her act.—THOMPSON v. JOHNSON, Tex., 19 S. W. Rep. 784.

43. DEED — Parol Evidence.— A deed of conveyance of real estate, which embraced a store building provided with shelving, contained the clause, "This grant includes all the shelving in the building:" Held, that the deed is not to be taken as intended to express or constitute the exclusive evidence of the whole contract or transaction, which resulted in the giving of the deed, so as to render incompetent parol proof of a sale of personal property at the same time.— BRETTO v. LEVINE, Minn., 52 N. W. Rep. 525.

44. DURESS. — A city merchant in whose store were employed 40 persons, and which was supplied with water only by the defendant's system of water works, there being three water-closets in the building, paid, under protest, an excessive charge for water, the defendant being about to shut off the supply for nonpayment: Held duress, and that an action may be maintained to recover the excess paid. — PANTON v. DULUTH GAS & WATER CO., Minn., 52 N. W. Rep. 527.

45. EMINENT DOMAIN — Market Value.—The "market value" means the fair value of the property as between one who wants to purchase and one who wants to sell, not what could be obtained for it under peculiar circumstances, when a greater than its fair price could be obtained nor its speculative value; not a value obtained from the necessities of another; nor on the other hand, is it to be limited to that price which the property would bring when forced off at auction under the hammer. It is what it would bring at a fair public sale, when one party wanted to sell and the other to buy. — KANSAS CITY, W. & N. W. R. CO. v. FISHER, Kan., 30 Pac. Rep. 111.

46. EMINENT DOMAIN—Right of Way.—The charter of a railroad company, after providing the manner in which the company should acquire a right of way by condemnation proceedings, provided, further, that, when any land to be taken for that purpose belongs to an infant having a resident guardian, such guardian might agree with the company on an "amount of damages to be paid for taking such lands, or release to said company his claim or right to damages in the premises:" Held, that such agreement or release might be made without previous ascertainment of the value of the property by condemnation proceedings.—LOUISVILLE, N. O. T. RY. CO. v. BLYTHE, Miss., 11 South. Rep. 112.

47. EQUITY—Quieting Title.—A court of equity has inherent power to remove a cloud from a title.—CLELAND v. CASGRAIN, Mich., 52 N. W. Rep. 460.

48. EVIDENCE—Presumptions.—A deed was of record in C county, while the land was in H county, which had been created out of part of C county by an act of the legislature which provided that until organized under the act it should remain under its former jurisdiction: Held that, in the absence of proof to the contrary, it would be presumed in favor of the recording that it was prior to the organization of H county.—TRIMBLE v. EDWARDS, Tex., 19 S. W. Rep. 776.

49. EXECUTION AGAINST THE PERSON — Discharge.—How. St. ch. 309, provides that every person who shall be imprisoned under an execution in a civil cause may apply for his "discharge from imprisonment" after a certain length of time, and make it the duty of the sheriff in whose custody the applicant shall be to report such application to the court from which the execution issued by virtue of which the person is imprisoned: Held, that the statute does not apply to a person who is released from custody on a bond for the jail limits, and is in a position to apply directly for a discharge.—MILLER v. STRABBING, Mich., 52 N. W. Rep. 453.

50. FALSE IMPRISONMENT — Justice of the Peace.—A justice of the peace, since he has no jurisdiction of an act which constitutes no offense, is liable for false imprisonment if he issues a warrant for a person's arrest, charging him merely with refusing to return money paid to him by mistake, and, after rendering a judgment that he return the money or be committed, issues a warrant under which he is committed.—DE COURCY v. COX, Cal., 30 Pac. Rep. 95.

51. FEDERAL OFFENSE—Mailing Obscene Letters.—An indictment under Rev. St. U. S. § 3893, for mailing letters giving information where obscence pictures can be obtained, is not bad because the letters, as set out in the indictment, do not themselves show that the pictures referred to are obscene, where the indictment further avers that the accused had in his possession a large number of obscene pictures, and that said letters were written and deposited in the mail with intent to give information concerning such pictures, and did in fact convey such information.—UNITED STATES v. GRIMM, U. S. D. C. (Mo.), 50 Fed. Rep. 528.

52. FERRY—Exclusive Rights.—A city ordinance which granted an exclusive ferry privilege for the period of 10 years is void under Const. art. 4, § 53, which prohibits the granting of exclusive rights, privileges, or immunities.—CARROLL v. CAMPBELL, Mo., 19 S. W. Rep. 809.

53. FRAUDULENT CONVEYANCE.—Defendant, a married woman, empowered to do business as a *feme sole*, became the surety of a partnership formed for the purpose of performing certain work as subcontractor. The firm being unable to go on, all its propetty and its rights under the contract with the principal contractor were assigned to defendant, the consideration being that defendant should complete the work under the contract, and, after reimbursing herself for the expenses, apply the balance of the partnership assets to the payment of the debts of the firm: Held, that such assignment was not in fraud of creditors.—CAVANAUGH v. RILEY, Ky., 19 S. W. Rep. 745.

54. GAMING—Constitutional Law—Cruel Punishment.—Gen. St. ch. 47, art. 1, § 1, as amended by Act March 25, 1886, providing that anyone who sets up or conducts a game of cards whereby money or other things may be lost or won "shall be deemed infamous after con

viction, and be forever thereafter disqualified from exercising the right of suffrage, and from holding any office of honor, trust, or profit, whether it be State, county, city, or municipal," is not unconstitutional as in violation of Const. 1850, art. 13, § 17, prohibiting the inflicting of cruel punishments.—HARPER V. COMMONWEALTH, Ky., 19 S. W. Rep. 737.

55. GIFT TO WIFE—Validity.—A gift to a married woman by her husband of money or property is valid, except as against the creditors of the latter and those having the equities of creditors.—GERMAN INS. CO. OF FREEPORT V. HYMAN, Neb., 52 N. W. Rep. 401.

56. HABEAS CORPUS—Jurisdiction of Federal Courts.—The federal courts have no jurisdiction to review by *habeas corpus* a judgment of conviction in a State court having jurisdiction of the person and the offense, although the prisoner had been extradited from another State to answer an indictment, and was convicted of an offense other than that charged therein. His remedy is by appeal or other appropriate proceedings in the State courts.—EX PARTE SKILES, U. S. C. C. (Minn.), 50 Fed. Rep. 524.

57. HOMESTEAD—Lease.—Under Code § 1990, declaring that, before a homestead can be conveyed or incumbered, husband and wife must both join in the same instrument, a husband cannot, by leasing the premises without her consent from the holder of a tax deed, prejudice her possession so as to prevent the running of the statute of limitations in favor of the wife as against the said deed.—BEEDLE V. COWLEY, Iowa, 52 N. W. Rep. 493.

58. HUSBAND AND WIFE — Partnership.—Code 1881, § 2396 *et seq.*, giving a married woman full dominion over her own property whether acquired before or after marriage, to enjoy and dispose of it without the intervention of her husband or responsibility for his debts, removing from her all civil disabilities not imposed upon the husband, and providing that, if the husband obtain possession of her property, she may maintain an action therefor, and may contract the same as if she were unmarried, does not imply that she may enter into a contract of partnership with the husband; and this, even though section 2417 declares that the said sections are not to be strictly construed.—BOARD OF TRADE OF CITY OF SEATTLE V. HAYDEN, Wash., 39 Pac. Rep. 87.

59. INSURANCE—Conditions of Policy.—A provision in a policy of fire insurance making it void "if any change takes place in the title, interest, or possession of the property," etc., is violated by the making of a lease which provides that, if the lessee pays the lessor a certain sum any time during the term thereof, the lessor "doth hereby sell, transfer, and convey" to the lessee the absolute title to the property.—FIRE ASS'N OF PHILADELPHIA V. FLOURNOY, Tex., 19 S. W. Rep. 793.

60. INSURANCE — Proof of Loss. — In an action upon a fire insurance policy, where the policy itself expressed what was to be done by the parties, in case of loss, it is error for the court to admit evidence as to the practice of other insurance agents in the same town, to establish the custom that proofs of loss were not required. Such evidence should be limited to the custom and usage of the company charged with liability, and is only competent then to show the power and authority given to the agent.—PHENIX INS. CO. OF BROOKLYN V. MUNGER, Kan., 30 Pac. Rep. 120.

61. INSURANCE—Proofs of Loss.—Though an insurance policy denies the power of any representative of the company to waive any condition except as therein allowed, the company's adjuster, sent to investigate a loss, has power to receive or refuse proofs of loss, and his statement, when offered informal proofs of loss by the assured, that they were not required, amounts to waiver of them.—YOUNG V. OHIO FARMERS' INS. CO., Mich., 52 N. W. Rep. 454.

62. INSURANCE—Title.—In an action on an insurance policy it appeared that assured was insolvent, and deeded the property to his wife; that on the day the deed was filed for record the property was attached by a creditor, who subsequently filed a bill to set aside the deed as fraudulent; that after the bill was filed assured procured the consent of the insurance company to assign the policy to his wife, without disclosing the condition of the title to the property: Held that, as the condition of the title was a fact material to the risk, its concealment in procuring consent to the assignment was such a fraud on the company as to avoid the policy.—HOME INS. CO. V. ALLEN, Ky., 19 S. W. Rep. 743.

63. INSURANCE—Waiver of Forfeiture.—A forfeiture in a policy of insurance may be waived where the insurer is informed of the facts out of which a forfeiture is claimed, but thereafter continues to treat the contract as binding, and induces the insured to act in that belief.—BILLINGS V. GER. INS. CO., Neb., 52 N. W. Rep. 397.

64. INSURANCE—Payable to Mortgagee.—An insurance policy provided that the loss, if any, should be payable to the mortgagee; that as to the mortgagee the policy should not be invalidated by the act or neglect of the mortgagor; and that, if the insurance company paid the mortgagee, claiming that, as to the mortgagor, no liability existed, it should, to the extent of such payment, be subrogated to the rights of the mortgagee: Held, that the insurance company, on payment to the mortgagee, did not become subrogated to his rights unless it was in fact not liable on the policy as against the mortgagor.—TRADERS' INS. CO. V. RACE, Ill., 31 N. E. Rep. 392.

65. INJUNCTION BOND—Damages.—Plaintiff levied an execution on certain lands, when defendant who was living on them claiming to be the owner, brought an action to enjoin the sale, filing an injunction bond. On final hearing the injunction was dissolved: Held, that plaintiff cannot recover on the bond either the rental value or the interest on the purchase price for the period during which he was enjoined.—COLBY V. MESERVEY, Iowa, 52 N. W. Rep. 499.

66. INTOXICATING LIQUORS—Injunction.—An injunction to abate a liquor nuisance will not lie against persons whose property was occupied by trespassers, who erected a shanty thereon, and illegally sold intoxicating liquors, of all which they had no knowledge till service on them of the petition, when they abated the nuisance; nor is the property subject to a lien for costs and attorneys' fees in respect of the injunction.—STATE V. LAWLER, Iowa, 52 N. W. Rep. 490.

67. JUSTICE OF THE PEACE—Change of Venue.—An affidavit by a person changed with an offense, in support of an application to change venue from one justice to another, under Rev. St. § 4809, providing that such person "shall make oath that from prejudice or other cause he believes that such justice will not decide impartially in the matter," which does not set out the facts constituting the alleged "prejudice or other cause," is insufficient. — HAGER V. FALK, Wis., 52 N. W. Rep. 432.

68. LANDLORD AND TENANT — The letting of several rooms in a tenement house does not imply that they are fit, or will continue fit, for the purpose for which they are let, where they pass into the exclusive possession of the tenant; and the landlord is not liable for injuries caused to the tenant's goods by a leak in the water-pipe. — MCKEON V. SULTER, Mass., 31 N. E. Rep. 389.

69. LANDLORD AND TENANT— Injuries.—The owner of premises not in his possession, and leased to another, is not liable for injuries suffered by one of his tenant's employees from the fall of a freight elevator, he having entered and started it, when it fell before he could get out, there being a notice posted by the owner, and familiar with him, prohibiting all persons from passing "up or down" in the elevator, "as it is considered dangerous and unsafe."— MCCARTHY V. FOSTER, Mass., 31 N. E. Rep. 385.

70. LANDLORD'S LIEN.—Acceptance by a landlord of a draft from the tenant in satisfaction of rent due, pay-

ment of which draft the tenant countermands, will not operate as a waiver of the landlord's lien for rent.—WORSHAM v. MCLEOD, Miss., 11 South. Rep. 107.

71. LARCENY—Under Crim. Code, § 127, declaring what offenses may be charged in the same indictment, an indictment may charge grand larceny, and also receiving property knowing it to have been stolen.—UPTON v. COMMONWEALTH, Ky., 19 S. W. Rep. 744.

72. LIEN ON BOATS. — Under Code, § 3432, providing that, in an action to recover for labor done in, about, or on a boat, "a warrant may issue for the seizure of such boat," plaintiff in such action has no lien before seizure.—SEIPPEL v. BLAKE, Iowa, 52 N. W. Rep. 476.

73. LIFE INSURANCE— Conflict of Laws.—A policy of life insurance, which does not become a binding contract until its delivery, is governed by the laws of the State in which the insured lives, to whom it was there delivered by a resident agent of the company, although it was executed and dated at the company's office in another State. — KNIGHT TEMPLAR & MASONS' LIFE INDEMNITY CO. v. BERRY, U. S. C. C. of App., 50 Fed. Rep. 511.

74. LIFE INSURANCE—Wife as Beneficiary.—While ordinarily a policy of life insurance payable to the wife upon the death of her husband is not subject to be applied in payment of his debts, yet where the policy is in the form of an endowment, a certain sum to be re paid after a specified number of years, the transaction is in the nature of a loan, the insurance being a mere incident; and, where the premiums have been paid by an insolvent debtor, the insurance money on such policy received by the wife during the life-time of the husband is not transmuted so as to be hers as against creditors of the husband, but is subject to their claims. TALCOTT v. FIELD, Neb., 52 N. W. Rep. 400.

75. LIMITATIONS — Presumptions. — The statute of limitations does not apply to an action by a legatee to collect a legacy which is a charge on land, and no presumption of payment arises from the lapse of 20 years.—WILLIAMS v. WILLIAMS, Wis., 52 N. W. Rep. 429.

76. LIMITATIONS — Severance of Interests.—Under the provisions of section 15, ch. 57, Comp. St., where one of the owners of a water power and grist mill, which has been destroyed, is a minor, the limitation of time within which the erection of a new mill must be commenced will not begin to run until he reaches his majority, and in such case the protection of the statute extends to other joint owners.—THOMPSON v. WIGGENHORN, Neb., 52 N. W. Rep. 405.

77. MANDAMUS — Municipal Officers. — *Mandamus* is a proper remedy for ascertaining the respective rights of two persons claiming the same municipal office.—KEOUGH v. BOARD OF ALDERMEN OF HOLYOKE, Mass., 31 N. E. Rep. 389.

78. MANDAMUS TO COURT. — *Mandamus* is the proper remedy, where a judge refuses to hear and determine a motion for a new trial, and the relator is entitled to have him proceed in the premises.—STATE v. STRATTON, Mo., 19 S. W. Rep. 803.

79. MANDAMUS TO COURTS AND JUDICIAL OFFICERS.—There being three judges of the superior court, *mandamus* will not lie against it and two of the judges, since if all three are necessary to constitute the court the proceeding should be against the other judge also; otherwise, against him only whose non-performance of duty is complained of.—STATE v. SUPERIOR COURT OF KING COUNTY, Wash., 30 Pac. Rep. 82.

80. MEASURE OF DAMAGES— Breach of Contract.—The measure of damages for the breach of a contract for the right to purchase public lands is the difference between the contract price and the salable value of such rights.—TELFENER v. RUSS, U. S. S. C., 12 S. C. Rep. 930.

81. MECHANICS' LIEN—Notice. — A lien notice should be sufficiently definite to fairly apprise the owner of what he is charged with, what kind of material, and what the same was furnished for.—TACOMA LUMBER & MANUF'G CO. v. KENNEDY, Wash., 30 Pac. Rep. 79.

82. MECHANICS' LIEN —Parties.—An action will not lie against a husband alone to enforce a mechanic's lien against his interest in community property, the wife being alive.— SAGMEISTER v. FOSS, Wash., 30 Pac. Rep. 80.

83. MECHANICS' LIENS—Property Subject to—Electric Light Companies.—An electric light company which has a franchise to occupy the streets of a city with its poles, wires, and lamps, and is engaged in furnishing light to the people, of the city, is not so distinctively public in its nature and operations as to exempt its property from the application of the mechanic's lien statute.—BADGER LUMBER CO. v. MARION WATER SUPPLY, ELECTRIC LIGHT & POWER CO., Kan., 30 Pac. Rep. 117.

84. MORTGAGE — Foreclosure.—A mortgage provided that the whole indebtedness should become due if the taxes remained unpaid for a given time, or in default of payment of interest: Held, where defendant mortgagor defaulted in the payment of taxes, and afterwards paid the same without prejudice to plaintiff mortgagee, and before suit brought to declare the debt due because of the default, that such payment was a bar to the suit.—SMALLEY v. RENKEN, Iowa, 52 N. W. Rep. 507.

85. MORTGAGE—Foreclosure of Mortgage—Receiver's Certificates.—In a suit to forclose a mortgage on the property of a coal mining company the court has no power, as against the objection of even a small minority of the holders of the mortgage bonds, to authorize a receiver appointed in the suit to issue certificates which shall be a first lien on the mortgaged property, in order to enable him to continue the operation of the mines.— FARMERS' LOAN & TRUST CO. v. GRAPE CREEK COAL CO., U. S. C. C. (Ill.), 50 Fed. Rep. 481.

86. MUNICIPAL CORPORATIONS—Defective Streets. — Where in an action against a city for personal injuries, received by plaintiff by falling into an unguarded area way in an alley, it appears that the plaintiff, without any reason, walked out of his way on a dark night into the alley, it is reversible error to refuse to instruct the jury to the effect that, if it was imprudent to enter said alley on account of the darkness, and if the plaintiff persisted in going in there when he might have taken a nearer and safer way, he was guilty of contributory negligence.—ELY v. CITY OF DES MOINES, Iowa, 52 N. W. Rep. 475.

87. NEGLIGENCE — Adjoining Land-owners — Excavations.—A lot owner in excavating for a building on his lot has a right to go below an adjacent owner's foundation wall, even though it is reasonably certain that such foundation wall will be endangered thereby; and, after giving due notice to such adjacent owner, the person excavating is chargeable only with reasonable care; it being the duty of the adjacent owner to use the necessary appliances to protect his building from the threatened injury.— CITY OF COVINGTON v. GEYLOR, Ky., 19 S. W. Rep. 741.

88. NEGLIGENCE — Canal within Corporate Limits.—Where a canal is lawfully constructed, and its maintenance and use within the corporate limits of a city are duly authorized, in the absence of statute, a private action cannot be maintained against its owners without averring and proving special damages caused by an improper or negligent exercise of the lawful rights pertaining thereto. Nor can the city arbitrarily close the head-gate of such canal, or compel its owners to construct bridges at its intersections with the city streets.— PLATTE & DENVER CANAL & MILLING CO. v. DOWELL, Colo., 30 Pac. Rep. 68.

89. NEGLIGENCE— Defective Highway — Telephone Wire.—Whether a person traveling along a highway, who undertakes to throw aside a telephone wire hanging so as to endanger travelers, and is injured by the electricity with which it is charged, is guilty of contributory negligence, and not entitled to the damages recoverable under Pub. St. ch. 52, § 18, for injuries sustained though a defect in a highway, is a question for

the jury.—BOURGET v. CITY OF CAMBRIDGE, Mass., 31 N. E. Rep. 390.

90. NEGOTIABLE INSTRUMENT — Indorsement for Collection.—Under Code § 2543, requiring every action to be prosecuted in the name of the real party in interest, one to whom a note has been indorsed for collection may sue thereon.—ABELL NOTE BROKERAGE AND BOND CO. v. HURD, Iowa, 52 N. W. Rep. 488.

91. PARTNERSHIP.— At common law an action could not be maintained by a partnership against another partnership having a common member with the former upon an agreement made between the two firms; but equity would take jurisdiction, and afford an adequate remedy.—CROSBY v. TIMOLAT, Minn., 52 N. W. Rep. 526.

92. PLEADING — Admissions.— Where a demurrer to a petition for libel was sustained on the grounds that the publication was not actionable *per se*, and that neither malice nor special damages were pleaded, an amendment by plaintiff in accordance therewith is an admission that it was not actionable *per se*.—SCHOLL v. BRADSTREET CO., Iowa, 52 N. W. Rep. 500.

93. PLEADING — Release and Discharge. — An agreement of settlement, which is afterwards denied by one of the parties, should be pleaded by way of defense to a suit on the original claim, and not presented by a motion to dismiss. — GEORGE v. CHICAGO, F. M. & D. M. RY. CO., Iowa, 52 N. W. Rep. 512.

94. PRINCIPAL AND AGENT—Mortgages.—Where C, who has been applied to for a loan on certain property, is to procure the money and pay off certain liens thereon, including a mortgage, and the mortgagee does not know that a loan had been negotiated for such purpose, nor authorize C to accept or hold the money for him, C is the agent of the mortgagor, and the mortgage is not satisfied until the money is actually paid to the mortgagee.—SECURITY CO. v. GRAYBEAL, Iowa, 52 N. W. Rep. 497.

95. PRINCIPAL AND SURETY—Change of Contract.—A and J, with H and C as sureties for J, made a contract whereby J was, on or before January 1, 1888, to sell and deliver to A 300 head of cattle one year old in June, 1887, at $5.50 per head, $800 in hand paid, balance on delivery of cattle. In January, 1888, after maturity of contract, J obtained a further advance of $400; and it was agreed by them, without the knowledge or consent of the sureties, that cattle a year old in 1888 should be delivered at $4.25 per head, instead of the cattle a yea old in 1887 at $5.50: Held, that the sureties were released by the change in the contract.—CLARK v. CUMMINGS, Tex., 19 S. W. Rep. 798.

96. PUBLIC LANDS—Replevin for Timber.—When the ownership of logs alleged to have been cut on land belonging to the United States depends upon the ownership of the land, the title to the land may be investigated and determined in an action of replevin brought by the United States to recover the logs.—UNITED STATES v. STEENERSON, U. S. C. C. of App., 50 Fed. Rep. 504.

97. RAILROADS—Farm Crossings.—The public has such a right or interest in the "adequate means of crossing" a railroad, which Code, § 1268, requires the company to construct where a person owns land on both sides of the track, that it may compel the company to observe its duty, where the track divides a pasture so that it is necessary that the owner's stock cross the track daily.—STATE v. MASON CITY & FT. D. R. CO., Iowa, 52 N. W. Rep. 490.

98. RAILROAD COMPANIES—Contributory Negligence.—Where, in an action to recover damages for personal injuries received at a railroad crossing, it appears that plaintiff was injured while traveling in a hired conveyance in a strange neighborhood in charge of a driver over whom he assumed no control, the route being left entirely to the determination of the livery-man and his driver, it is not error to instruct the jury that, if the driver was guilty of negligence which contributed to the injury, such negligence would prevent a recovery by the plaintiff only in case the driver was under the control of plaintiff, or in case he had the right to control and direct him.—LARKIN v. BURLINGTON, C. R. & N. RY. CO., Ia., 52 N. W. Rep. 480.

99. RAILROAD COMPANIES—Fires.—In an action against a railway company for negligently causing a fire which destroyed plaintiff's property the degree of carefulness required of the company to avoid liability depends upon circumstances. The care should be commensurate with the danger, but, whether the care so required is slight or extreme, it is "ordinary care;" for "ordinary care" is that degree of care which a person of ordinary prudence would exercise under the particular circumstances of the case.—CRONK v. CHICAGO, M. & ST. P. RY. CO., S. Dak., 52 N. W. Rep. 420.

100. RAILROAD COMPANIES — Injunction. — Where a company is authorized to construct and operate a railroad track in a street a court cannot restrict the number of trains to be operated as a condition precedent to the construction of the track.—KENTUCKY & I. BRIDGE CO. v. KREIGER, Ky., 19 S. W. Rep. 738.

101. RAILROAD COMPANIES — Lease—Ultra Vires.—A lease of one railroad to another for the term of 999 years is unlawful and wholly void, and cannot be subsequently ratified, unless expressly authorized by the charters of both corporations, or by the laws of the States creating them.—ST. LOUIS, V. & T. H. R. CO. v. TERRE HAUTE & I. R. CO., U. S. S. C., 12 S. C. Rep. 953.

102. REMOVAL OF CAUSES—Separable Controversy.—In an action against a railway company to recover the value of certain cotton destroyed by fire while in the possession of a storage company, and for which defendant had issued to the owners bills of lading, certain insurance companies who had insured the cotton for defendant were made defendants: Held, that the court below properly refused the petition of the insurance companies for a removal of the cause as a separable action to the federal court, as the real controversy was between plaintiffs and the railway company, and as the liability of the insurance companies was incidental to that of the railway company.—INSURANCE CO. OF NORTH AMERICA v. DELAWARE MUTUAL SAFETY INS. CO., Tenn , 19 S. W. Rep. 755.

103. SALE—Fraud of Purchaser.—When goods are sold upon credit induced by the fraudulent representations of the purchaser as to his financial ability, the vendor may rescind the contract within a reasonable time after the discovery of the fraud, upon a return of, or offer to return, the consideration received by him, and reclaiming the goods as against any one not a *bona fide* purchaser for value without notice of the fraud.—TOOTLE v. FIRST NAT. BANK OF CHADRON, Neb., 52 N. W. Rep. 396.

104. SALE—Rescission.—Defendant purchased goods of plaintiff, leading him to believe that he was buying as the agent of a certain firm, but in reality for himself. Plaintiff, without full knowledge of the facts, cashed the defendant's check, given in payment of the balance which defendant said was due on the purchase: Held, that a tender back by plaintiff of the amount to defendant upon hearing of his having resold as principal to a third person, and just prior to his bringing replevin for the goods against defendant and the purchaser, is a rescission of the sale.—MAYHEW v. MATHER, Wis., 52 N. W. Rep. 436.

105. SALE—Statute of Frauds.—Where, in an oral order given for the purchase of goods exceeding $50 in value, the seller is instructed by the buyer to deliver them to a certain named person, who receives them without objection, and the goods are in fact such as were ordered, and are without any defect or deficiency whatever, they are to be deemed as received and accepted by the purchaser himself through his agent constituted for that purpose. An action for the price is not within the statute of frauds, as embodied in section 1950 of the Code.—SCHRODER v. PALMER HARDWARE CO., Ga., 15 S. E. Rep. 327.

106. SLANDER OF TITLE—Letters Patent.—Equity has no jurisdiction to enjoin a slander of title to letters

patent till after the question of slander has been determined by a jury in an action at law.—FLINT v. HUTCHINSON SMOKE BURNER CO., Mo., 19 S. W. Rep. 804.

107. SPECIFIC PERFORMANCE — Contract.—A contract provided that defendant should bond a mining property for two years at a sum named, and give a working lease on it for the same time, holding a one-fifth interest in the net profits of the lease, the mines to be developed for sale, and ore to be shipped when convenient and profitable, defendant to be employed in the mines, and profits divided: Held, that the agreement was too indefinite to sustain a decree for specific performance.—WINTER v. GOEBNER, Colo., 30 Pac. Rep. 52.

108. TAXATION—Assessment.—A court of equity will not restrain the collection of a tax on the mere showing that the tax proceedings are irregular or void, but it must also appear that they are inequitable, and that it would be against conscience to let them go on.—HIXON v. ONEIDA COUNTY, Wis., 52 N. W. Rep. 445.

109. TAXATION — Equalization.—Under the provision of Gen. St. 1878, ch. 11, § 79, an omission to have an assessment of real property revised and equalized by the county board will not affect or invalidate the taxes upon such property, in the absence of any claim by the owner that the omission has resulted to his prejudice, and that the taxes against the property have been partially, unfairly, or unequally assessed.—SCOTT COUNTY v. HINDS, Minn., 52 N. W. Rep. 523.

110. TAXES—Constitutional Law.—Local Act 1891, No. 294, authorizing the surplus of a highway fund levied for highway purposes upon a surveyed township to be expended for the benefit of another surveyed township (both composing one township), not contiguous to it and not for highway purposes, within the same assessing district, is unconstitutional for lack of uniformity.—MANISTEE LUMBER CO. v. TOWNSHIP OF SPRINGFIELD, Mich., 52 N. W. Rep. 468.

111. TELEGRAPH COMPANIES—Grant by Railroad.—A contract whereby a railroad company grants to a telegraph company a right of way along its road for a telegraph line, and agrees that it will not grant such right for the construction of any other telegraph line, does not vest in the telegraph company such an exclusive interest in the railroad's right of way for telegraph purposes as would entitle it to an injunction against the construction of another telegraph line thereon.—PACIFIC POSTAL TELEGRAPH CABLE CO. v. WESTERN UNION TEL. CO., U. S. C. C. (Wash.), 50 Fed. Rep. 493.

112. TENANTS IN COMMON.—Tenants in common have no lien against a cotenant's undivided interest in land in the hands of an assignee for rents in excess of his share collected and retained by him.—FLACK v. GOSNELL, Md., 24 Atl. Rep. 414.

113. TENANT IN COMMON—Lien.—No lien exists in favor of cotenants for a balance due them by their cotenant for rents and profits of the joint estate, as against a *bona fide* purchaser or incumbrancer of the interest of such cotenant. — BURNS v. DREYFUS, Miss., 11 South. Rep. 107.

114. TRIAL—Average—Verdict.—Although a court may be justified in refusing to set aside a verdict rendered by the jury on the "average theory," yet the trial court ought not to suggest to the jury, if the witnesses differ as to values, that they ascertain what the average of the estimates are first, and then afterwards decide whether such an average is fair or full value.—KANSAS CITY, W. & N. W. R. CO. v. RYAN, Kan., 30 Pac. Rep. 108.

115. TRIAL BY COURT — Findings.—When an action is tried by the court without a jury, and no finding or declaration of law, in the nature of an instruction, is made by the court or requested by either party, it must be presumed that the court is governed by proper rules of law in considering the evidence.—WITKOWSKI v. HILL, Colo., 30 Pac. Rep. 55.

116. TRUSTEE'S BOND — Liability for Prior Default.—Under a bond given by a trustee during his trusteeship, conditioned to be void if the trustee faithfully perform the trust reposed in him, the sureties are not liable for a default fully consummated before execution of the bond.—STATE v. BANKS, Md., 24 Atl. Rep. 415.

117. VENDOR AND PURCHASER — Defective Title.—One who purchases property with notice of a defect in the title cannot resist payment of a purchase-money note by reason of such defect. — TWOHIG v. BROWN, Tex., 19 S. W. Rep. 768.

118. VENDOR AND VENDEE— Adverse Possession.—One who takes possession of land under a contract of purchase cannot dispute the title of his vendor.—WOLF v. HOLTON, Mich., 52 N. W. Rep. 459.

119. VESTED RIGHTS—Cemeteries.—Laws 1876, ch. 266 (Rev. St. § 1439), providing that, when a town cemetery becomes embraced within a city, the duties and powers of the town board relating thereto shall be exercised by the common council of the city, transfers to the city merely the naked legal title to the cemetery and is not invalid as impairing vested rights.— CITY OF COLUMBUS v. TOWN OF COLUMBUS, Wis., 52 N. W. Rep. 425.

120. WATER COMPANIES—Taxation.—An assessment of several lots, on which are the pumping works and station of a water company, merely by their numbers and the number of the block in which they are, is insufficient to lay the foundation for or to give the board of review jurisdiction to make, as against such lots, a valuation of the entire property of the water company, including its mains, pipes, hydrants, rights, and franchises.—FOND DU LAC WATER CO. v. CITY OF FOND DU LAC, Wis., 52 N. W. Rep. 439.

121. WATERS—Irrigation — Appropriation.—Where by common consent a municipality has for many years regulated the appropriation of the waters of a certain river for irrigation purposes, by allowing a *pro rata* distribution among the appropriators in case of deficiency, it has no right to subsequently divide the appropriators into two classes, according as their use began before or after a certain arbitrary date, and to restrict only those of the second class; but all must be served alike.—HOLMAN v. PLEASANT GROVE CITY, Utah, 30 Pac. Rep. 72.

122. WILLS—Capacity to Make.—The burden of proving testamentary capacity is on those claiming under the will, and it is not shifted by proof of the *factum* of the will, and of testamentary capacity by the attesting witnesses. — NORTON v. PAXTON, Mo., 19 S. W. Rep. 807.

123. WILLS—Contest. — In an action to set aside a will admitted to probate with the exception of a clause making a devise to defendant K, the entire will was established, and, on the issue of ademption or satisfaction of the devise to K, interjected into the case, over the objection to K, by the other defendants, there was a finding for K: Held, on appeal by the other defendants, that the action of the court in considering the question of ademption being erroneous, that part of the judgment would be set aside.—OWENS v. SINKLEAR, Mo., 19 S. W. Rep. 813.

124. WILLS—Res Judicata. — Code, §§ 1987-1989, require notice of a proceeding for the probate of a will to be given to testator's next of kin, and an opportunity for them to contest in the probate court. Section 2000 provides that "any person interested in any will, who has not contested the same under the provisions of this article, may contest the same by bill in chancery:" Held, that a person who was duly served with notice of a proceeding in the probate court, but who did not contest the will there, may afterwards contest it by bill in chancery. — KNOX v. PAULL, Ala., 11 South. Rep. 156.

125. WITNESS — Cross-examination. — A defendant testifying as a witness in his own behalf is subject to cross-examination as to previous declarations contrary to his testimony as given, the same as any other witness; and this notwithstanding his supposed declarations might have been shown as a part of the plaintiff's case in chief.— CRAVENS v. BENNETT, Colo., 30 Pac. Rep. 61.